IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

LINDA SMITH, et al., and the Class She Seeks To Represent,	)	
PLAINTIFFS,	)	
vs.	)	CIVIL ACTION NO: CV-05-01359-VEH
U. S. STEEL CORPORATION and UNITED STATES STEEL CORPORATION FAIRFIELD WORKS,	)	
DEFENDANT.	)	

JOINT SUBMISSION IN SUPPORT OF JOINT MOTION FOR FINAL APPROVAL OF A CLASS ACTION SETTLEMENT

COME NOW Plaintiffs and Defendant and file this submission in support of the parties' Joint Motion for Final Approval of a Class Action Settlement. For the reasons stated herein, this Court should grant final approval of the proposed settlement of this action.

I. INTRODUCTION

On December 4, 2008, this Court entered its Preliminary Approval Order of the Class Action Settlement in this case. Thereafter, notice was provided to class members. Five hundred and ten class members filed valid and timely claims (Declaration of Brian Collis at ¶ 9, Ex. 4 (Document #58)). An additional 45 class members submitted valid but untimely claims (Declaration of Brian Collis at ¶ 9,

Ex. 3 (Document #58)). The parties have jointly requested that the Court approve these additional 45 claims as well, resulting in 555 class members who will each receive a payment under the Settlement Agreement in the sum of approximately $1000.00.[1] In addition, no class member filed an objection to the settlement, no class member filed a notice of intent to appear at the Final Hearing, and only two potential class members opted out of participation in the settlement.[2]

II. STATEMENT OF THE CASE

On June 28, 2005, plaintiffs filed their complaint in this action. In their complaint, plaintiffs allege that they applied for an entry level production position at United States Steel's ("USS") Fairfield Works and that their application was denied because of their sex. This action was brought on behalf of a class of similarly situated female employees and contended that USS's hiring process had a disparate impact on females. Specifically, plaintiffs claimed that the requirement by USS of two years of heavy industrial experience had a disparate impact on

[1] The parties request the Court approve the 45 valid but untimely claims because: (1) such approval will permit additional class members to receive compensation; (2) the amount each eligible class member receives will not be substantially impacted by the addition of these 45 claimants; and (3) such inclusion will lessen the likelihood of an appeal being filed which would significantly delay payment of benefits to all class members.

[2] According to the Claims Administrator, it received two valid opt out requests (Susan L. Hurley and Jerry W. Wilson) (Declaration of Brian Collis at ¶ 10 (Document #58)). To constitute a valid opt out request, the potential class member was required to submit the opt out documentation to the Claims Administrator, as well as file a copy with the Court (Notice). In addition, Atrina Pugh filed documentation with the Court requesting to be excluded from settlement, but apparently did not submit such documentation to the Claims Administrator. Hurley, Wilson and Pugh do not appear on either Exs. 3 or 4 of the Claims Administrator's Declaration and are not bound by the Settlement Agreement in any event.

females and violated Title VII of the Civil Rights Act of 1991, as amended. USS answered the complaint, generally denied its allegations, and discovery was initiated among the parties. During the course of discovery, USS produced over 12,000 pages of documents. In addition, USS produced a voluminous database, including hiring data, and numerous depositions were taken.

Plaintiffs retained multiple expert witnesses including Rebecca Klemm, a statistical expert, to analyze the database produced by USS. Klemm concluded that the heavy industrial experience requirement had a disparate impact on females. Plaintiffs also retained Drs. Joel Lefkowitz and Jay Finkleman, industrial psychologists, to evaluate the USS hiring process. Drs. Lefkowitz and Finkleman concluded that the hiring process had a disparate impact on females and was not appropriately validated in accordance with the EEOC Uniform Guidelines On Employee Selection Procedures.

USS retained statistical experts, Mary Dunn Baker and ERS Group, who concluded that USS's hiring process did not have a disparate impact on females. Further, USS retained industrial psychologist experts Applied Psychological Techniques, Inc., ("APT") and Dr. Kathleen K. Lundquist to evaluate its hiring process. Dr. Lundquist concluded that the two year heavy industrial experience requirement was valid and in accordance with the EEOC Uniform Guidelines On Employee Selection Procedures.

Plaintiffs filed a Motion to Amend the Complaint that added ten additional named plaintiffs and defendant opposed that Motion. In addition, two other individuals filed EEOC Charges with the EEOC. Subsequently, plaintiffs filed an Amended Motion to Amend, including all twelve individuals as named plaintiffs. The Court has allowed the Amended Complaint conditioned upon approval of this settlement.

In view of the differing expert testimony in this case, the additional expert witness and litigation expenses that would be incurred with the continued litigation of this case, and the uncertainties regarding the outcome of this case, the parties decided to enter into non-binding mediation before Hunter R. Hughes of Rogers & Hardin, LLP in Atlanta, Georgia. After extensive mediation, the parties were finally able to reach an arms-length settlement in principle. As part of that settlement, USS agreed to implement a new hiring process that was appropriately validated by APT and subject to review by plaintiffs' expert witnesses. APT thereafter undertook this assignment, conducted various focus groups, analyzed extensive materials and data, and developed a new hiring process that was reviewed, modified and approved by plaintiffs' experts. The parties then finalized the settlement agreement and presented it to the Court which preliminarily approved the agreement.

III. BACKGROUND REGARDING USS'S CURRENT HIRING PROCESS

A. Fairfield Works

USS operates a fully integrated steel making facility in Fairfield, Alabama ("Fairfield Works"). (Anthony Depo. p. 73).[3] Fairfield, Alabama is located contiguous to Birmingham, Alabama in Jefferson County, Alabama. The Fairfield Works employs approximately 1600 bargaining unit production and maintenance employees. (Bennick Depo., p. 233).[4] These employees are represented by the United Steel Workers of America ("USWA") and the terms and conditions of their employment are subject to the Basic Labor Agreement ("BLA"). (Bennick Depo., pp. 32-35). USS has other steel making facilities located throughout the country and the world. (Bennick Depo., pp. 192-93).

B. Hiring

In May 2003, USS and the USWA entered into the May, 2003 BLA. (Bennick Depo., pp. 32-35). Prior to the BLA, the production and maintenance employees at USS held thirty-six (36) different job classifications. (Id. at pp. 36, 95-96). In the 2003 BLA, USS and USWA agreed to reduce the number of job classifications to five (5) labor grades, with the former job classifications basically becoming job assignments within the five new labor grades. (Id. at pp. 36, 95-99,

[3] Excerpts from the Deposition of Larry Anthony are attached hereto as Ex. 1.

[4] Excerpts from the Deposition of Charles D. Bennick are attached hereto as Ex. 2.

105). The Labor Grade 1 job is referred to as Utility Person and the Labor Grade 2 job is referred to as Utility Technician. (Id. at p. 99).

C. The RTI Process

Beginning in early 2004, USS contracted out to The Right Thing, Inc., ("RTI") portions of its hiring procedure. (Bennick Depo., pp. 29, 32, 57-59). RTI is a staffing company located in Ohio. (Id. at pp. 134-35). New hiring procedures were developed that involved multiple stages. (Anthony Depo., pp. 157-58, 181-84, 217-18; Bennick Depo., pp. 35, 57-60, 177-78, 184-86, 210). Initially, RTI was responsible for advertising the entry level production positions. (Anthony Depo., p. 76; Bennick Depo., pp. 57-59). Such positions were also listed with the State Employment Service. (Anthony Depo., pp. 14-15, 37; Bennick Depo., pp. 60-61). RTI advertised these positions on the internet, as well as through notices to various labor unions, lodges, and organizations such as the YWCA. (Anthony Depo., p. 74; Bennick Depo., pp. 142-43, 163).

An electronic job seeker would access an internet screen (AP Screen) and complete that screen. (Anthony Depo., pp. 34, 149; Bennick Depo., pp. 47-48, 60, 120). Certain questions on the AP Screen would be disqualifiers. (Anthony Depo., pp. 76, 80, 112, 126, 137-38; Bennick Depo., pp. 47-49). If the individual satisfactorily completed the AP Screen, then RTI would schedule them for testing conducted by RTI at Fairfield Works. (Anthony Depo., pp. 126-27, 135-37;

Bennick Depo., pp. 55-56, 83-84, 121). This testing would include four pen and pencil tests. (Anthony Depo., pp. 66-67, 137; Bennick Depo., pp. 53, 55-56, 91). Additionally, the individual would complete various documents at this time, including an application and a release for background checks. (Anthony Depo., p. 137; Bennick Depo., pp. 55, 85-86, 88-90, 121).

If the individual satisfactorily completed the testing stage, an APP review was conducted by USS. (Anthony Depo., pp. 52-58, 68, 137; Bennick Depo., p. 56). This APP review was a modification that USS implemented after a short period of time under the RTI process. (Anthony Depo., pp. 53-55). The APP review primarily was to make sure that the individuals possessed the requisite experience. (Anthony Depo., pp. 54, 57-58). If any argument could be made that the individual had the necessary experience, they were passed through the APP review. (Anthony Depo., pp. 57-58). Assuming satisfactory completion of the APP review, RTI would conduct a telephone interview. (Anthony Depo., pp. 56-58; Bennick Depo., pp. 54-55, 121, 128-29). Assuming satisfactory completion of the telephone interview and the background check, the individual would be scheduled for an on-site interview by USS personnel. (Anthony Depo., pp. 68, 160; Bennick Depo., pp. 121-22, 183). At that time, the individual would also be subject to drug screens. (Bennick Depo., pp. 121-22, 213-14). Assuming satisfactory completion of these steps, the individual would be extended a

conditional job offer subject to a physical and another drug screen. (Anthony Depo., p. 97; Bennick Depo., pp. 122, 213-14).

IV. TERMS OF THE SETTLEMENT

The settlement agreement consists of three primary elements. First, USS has agreed to implement a new hiring process which has been validated in accordance with the EEOC Uniform Guidelines On Employee Selection Procedures. (APT Report).[5] APT developed the new process after extensive research, review of materials and data and employee interviews. Plaintiffs' expert witnesses have approved this new process.

As part of the new hiring process, USS has agreed to change the two year heavy industrial experience requirement to a one year industrial experience requirement. USS has also deleted a question that plaintiffs' expert asserted had the highest disparate impact on females. USS estimates that the development and implementation of the new process including incurred expert fees, future expert fees, legal fees, and internal time and effort, has and will cost it in excess of Five Hundred Thousand and No/100 Dollars ($500,000.00).

Second, the settlement agreement establishes that USS will pay up to Five Hundred Eighty Thousand and No/100 Dollars ($580,000.00) in approved claims (less administrative expenses of $25,000.00) by eligible class members. Each

[5] APT's Report is attached hereto as Ex. 3.

eligible class member with an approved claim will receive approximately $1000.00 as non-wage damages.

USS also will pay Ten Thousand and No/100 Dollars ($10,000.00) to each of the following named plaintiffs for the emotional distress allegedly suffered in assuming the risks and notoriety related to being a named plaintiff and bringing EEOC charges in this class action litigation, including the potential liability for USS's taxable legal costs had USS litigated this action to a conclusion in its favor: Linda Smith, Heather McGuffie, Arleen Thomas, Christy Warren, Angela Farmer, Jamie Allen, Teresa Davis, Lucie Johnson, Ginger Beasley, Annette Pack, Odora Beckwood, Phyllis Andrews and Ann Shaw. In addition, USS will pay Linda Smith $10,000.00 for time spent preparing for and giving of her deposition, for time spent in reviewing the records of USS, and for time spent meeting with and talking to class counsel to help in the prosecution of this case. USS also will pay Linda Smith $80,000.00 for her agreement not to apply for employment with USS in the future. The payments to the named plaintiffs are in lieu of payment from the claim fund.

Finally, the settlement agreement also provides for payment of Class Counsel attorneys' fee and costs in the amount of $500,000.00. This includes over $169,000.00 Class Counsel incurred in costs and expenses in this action. Additionally, Class Counsel represents they expended in excess of 1075 hours of

attorney time prosecuting this case over the last four years. An award of $500,000.00 for attorney's fees and costs is thus reasonable.

V. NOTICE TO THE CLASS

The settlement agreement provided for individual notice to the class of the terms of the agreement. The individual notice is constitutionally adequate and complies with Rule 23 of the Federal Rules of Civil Procedure, both in substance and in the methods by which it will be disseminated.

Rule 23 requires that notice be given "in a reasonable manner" to all class members. United States v. Alabama, 271 Fed. Appx. 896, 900-901 (11th Cir. 2008). The individual notice provided in this case contained all of the essential elements necessary to satisfy any due process concerns and actually included a copy of the settlement agreement. See United States v. Alabama, 271 Fed. Appx. at 901 (finding notice sufficient where class members were apprised that they could view the settlement agreement on a website). The individual notice and enclosures set forth the class definition; showed the terms of the settlement, including the amount of incentive payments and the amount of Class Counsel's fees; showed the formula for distribution of benefits under the settlement; and provided information regarding the manner in which objections, opt-outs and notices of intent to appear at the hearing could have been submitted. The individual notice also gave the date and location of the Fairness Hearing on the

settlement and generally explained what would take place at the Fairness Hearing. See Perez v. Asurion Corp., 501 F. Supp. 2d 1360, 1377 (S.D. Fla. 2007); Borcea v. Carnival Corp., 238 F.R.D. 664, 677 (S.D. Fla. 2006) (finding notice adequate after a review of similar factors).

The settlement agreement also provided a method of disseminating the individual notices that satisfied the requirements of Rule 23 and due process. The Notice was disseminated by a Claims Administrator. USS provided to plaintiffs' counsel and the Claims Administrator a list of all class members which was drawn from a computerized database maintained by RTI. Following the Court's preliminary approval of the settlement agreement, the Claims Administrator provided individual notice to each class member for whom deliverable addresses were obtained. The Claims Administrator kept records of all notices returned for any reason, and made substantial efforts to determine recent addresses for returned notices and forwarded new notices. See Adams v. Southern Farm Bureau Life Ins. Co., 493 F.3d 1276, 1286-87 (11th Cir. 2007) (approving of a similar process). The Claims Administrator has filed its report with the Court as required by the Court's Preliminary Approval Order.

VI. APPROPRIATENESS OF CLASS CERTIFICATION

A class may be certified solely for purposes of settlement when settlement is reached before a litigated determination of the class certification issue. See

Woodward v. NOR-AM Chem. Co., No. Civ. 94-0780-CB-C, 1996 WL 1063670, at *14 (S.D. Ala. May 23, 1996) (citing In re Beef Indus. Antitrust Litig., 607 F.2d 167, 173-78 (5th Cir. 1979)); see also Borcea, 238 F.R.D. at 670 (giving preliminary approval of the settlement agreement, lifting the stay, authorizing the filing of the second amended complaint, conditionally certifying the class for settlement purposes, and authorizing distribution of the settlement notice) and Ingram v. Coca-Cola Co., 200 F.R.D. 685 (N.D. Ga. 2001). In fact, "[c]ertification of settlement classes after a settlement has been reached has become routine." Woodward, 1996 WL 1063670, at *14. Where, as in this case, a class action is settled prior to certification, the appropriate procedure is for the Court to conditionally certify a temporary settlement class for the purpose of providing notice to putative members of the proposed class of the terms of the anticipated settlement and of their opportunity to opt out and/or object. Id.

In order to certify a class action under Rule 23(a), the Court must find that: "(1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interest of the class." FED. R. CIV. P. 23(a). In addition, the Court must find that "the questions of law or fact common to the members of the class predominate" over individual issues of

law or fact, and that "a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." FED. R. CIV. P. 23(b)(3).

As a threshold matter, there are in excess of 500 class members, easily meeting the requirement of numerosity. Cox v. American Cast Iron Pipe Co., 784 F.2d 1546, 1553 (11th Cir. 1986) (numerosity requirement usually satisfied where putative class exceeds forty members).

The issues in this case are typical and common to the class and predominate over any individual issues pertinent to the resolution of the remainder of class members' claims, both in terms of the common core facts relating to USS's hiring process and the legal claims which have been asserted by the plaintiffs. The plaintiffs assert that USS's two year heavy industrial experience requirement has a disparate impact on females. Thus, each class member is impacted in the same manner and method by the alleged wrongdoing. Likewise, USS's defense that its experience requirement is job related and consistent with business necessity will be common and typical to all class members. Finally, plaintiffs' allegation that less burdensome alternative means are available is likewise common to all class members. See e.g., Busby v. JRHBW Realty, Inc., 513 F.3d 1314, 1322-27 (11th Cir. 2008); Kornberg v. Carnival Cruise Lines, Inc., 741 F.2d 1332, 1337 (11th Cir. 1984), cert. denied, 420 U.S. 1004 (1985); Ingram, 200 F.R.D. at 697-701

(cases finding commonality, typicality and predominance when the plaintiff's allegation is one of discrimination based on a company policy).

The named plaintiffs and Class Counsel have adequately represented the class. Class Counsel is well-experienced in complex litigation and class actions in the employment area and their work has been both effective and adequate. See Woodward, 1996 WL 1063670, at *15. Likewise, there is no evidence that the named plaintiffs have interests antagonistic to the class. Id. "[A]ll are united in asserting a common right and achieving a common goal - specifically, the maximum positive recovery for the class under the fairest terms possible." Id.

Class resolution of these claims is superior to individual litigation for the fair and efficient adjudication of the case. Because the case alleges that USS's hiring process has a disparate impact on females, statistical analysis and other analysis by expert witnesses is necessary and very costly. The documents and database at issue are voluminous, which increases the expense necessary to litigate the case. The cost of litigation and the expertise and other resources necessary to litigate the case make it cost prohibitive for persons to bring and maintain the case on an individual basis. See Ingram, 200 F.R.D. at 701. All requirements of Rule 23 certification are thus met, and the case is appropriately certified as a class action.

VII. STANDARDS FOR EVALUATING THE PROPOSED CLASS SETTLEMENT AGREEMENT

Settlement of class actions are "highly favored in the law and will be upheld whenever possible." Bennett v. Behring Corp., 96 F.R.D. 343, 348 (S.D. Fla. 1982), aff'd, 737 F.2d 982 (11th Cir. 1984); see also, Cotton v. Hinton, 559 F.2d 1326, 1331 (5th Cir. 1977) ("Particularly in class action suits, there is an overriding public interest in favor of settlement."). In order to approve settlement, the district court must find that it "is fair, adequate and reasonable and is not the product of collusion between the parties." Id. at 1330. As discussed below, the settlement agreement was reached after extensive arms-length negotiations before a neutral mediator free of fraud and collusion, and is a fair, adequate and reasonable settlement for all parties. The Court therefore should grant preliminary approval of the settlement agreement.

A. There Has Been No Fraud Or Collusion Between The Parties.

In approving the settlement agreement, the Court must first examine whether the agreement has resulted from fraud or collusion, or instead whether the settlement was achieved in good faith after arms-length negotiations. Knight v. Alabama, 469 F. Supp. 2d 1016, 1031 (N.D. Ala. 2006), aff'd sub nom. United States v. Alabama, No. 07-10235, 2008 WL 834130 (11th Cir. Mar. 28, 2008). This requirement is easily met here, where the settlement agreement resulted from arms-length negotiation after an intensive mediation process.

The mediator in the case was Hunter Hughes of the Rogers & Hardin firm in Atlanta, Georgia. Mr. Hughes is a distinguished, highly respected mediator who has had substantial experience in mediating complex employment litigation. The formal mediation proceeding took place at Mr. Hughes' office on March 12, 2007. The parties did not reach settlement at that time but continued to negotiate for approximately five (5) months. After reaching an agreement in principle at that time, the parties spent approximately ten (10) more months finalizing the details of the agreement. The parties communicated with Mr. Hughes separately at mediation meetings and continued to negotiate until the final details of the settlement agreement were reached. It is clear that the settlement agreement was the result of adversarial negotiations, without any fraud or collusion. See Ashley v. Regional Transp. Dist. & Amalgated Transit Union Div. 1001 Pension Fund Trust, No. 05-CV-01567-WYD-BNB, 2008 WL 384579, at *6 (D. Colo. Feb. 11, 2008) (finding that involvement by a mediator and a four month negotiation period indicated no fraud or collusion).

B. The Terms Of The Settlement Are Fair, Adequate And Reasonable.

In addition to determining that a proposed settlement is free of fraud or collision, the Court must also determine whether the terms of the settlement are fair, adequate and reasonable. Bennett v. Behring Corp., 737 F. 2d 982, 986 (11th Cir. 1984). Where settlement of a class action results from arm's length

negotiations between experienced counsel after significant discovery has occurred, the Court may presume the settlement to be fair, adequate, and reasonable. See Wal-Mart Stores, Inc. v. Visa U.S.A., Inc., 396 F.3d 96, 116 (2d Cir.), cert. denied, 544 U.S. 1044 (2005). See also, Lucas v. Kmart Corp., 234 F.R.D. 688, 693 (D. Colo. 2006) (finding same); Ingles v. Toro, 438 F. Supp. 2d 203, 216 (S.D.N.Y. 2006) (same). The judgment of experienced counsel is relevant to approval. See Cotton v. Hinton, 559 F.2d 1326, 1331 (5th Cir. 1977) (holding that the court is entitled to rely on the judgment of experienced counsel for the parties in evaluating settlement and should be hesitant to substitute its judgment for that of counsel in the absence of fraud or collusion).

Here, the settlement agreement will end over three years of complex, expensive and hard fought litigation which benefits all parties and eliminates the extensive risks and difficulties each party would have faced if this case continued to trial. The settlement occurred only after the parties had conducted substantial discovery and evaluated their positions and then engaged in lengthy settlement negotiations.

The settlement results in an immediate change in USS's hiring process. Because of these changes, USS will have an improved process that has been validated, and the elements of the previous hiring process that plaintiffs alleged had caused a disparate impact will have been eliminated. The plaintiffs will have a

better hiring process in place through which they will have an opportunity to obtain employment at USS. The settlement agreement also provides the plaintiffs with a fair and reasonable monetary recovery, which treats each class member fairly by providing a similar amount of compensation to each and incentive payments to the named plaintiffs. The settlement agreement is fair to USS by providing a release of liability. Finally, the settlement will further conserve considerable judicial resources that the continued litigation of this case would have required. It is the opinion of Class Counsel and counsel for USS that the terms of the settlement agreement are fair, adequate and reasonable.

In evaluating the settlement agreement, "[t]he Court must be guided by 'the strong judicial policy favoring settlement as well as by the realization that compromise is the essence of settlement.'" Carnegie v. Mutual Sav. Life Ins. Co., No. CV-99-S-3292-NE, 2004 WL 3715446, at *17 (N.D. Ala. Nov. 23, 2004) (quoting Bennett, 737 F.2d at 986). With this in mind, the Court should examine the following factors: "(1) the likelihood of success; (2) the range of possible recovery; (3) the point on or below the range of recovery at which settlement is fair, adequate and reasonable; (4) the complexity, expense and duration of the litigation; (5) the substance and amount of opposition to the settlement; and (6) the stage of proceedings at which the settlement was achieved." Bennett, 737 F.2d at 986.

As shown below, all six of the necessary Bennett factors confirm that the Settlement Agreement is fair, reasonable and adequate, and should therefore be approved by the Court.

1. The Likelihood of Success at Trial.

In evaluating the likelihood of success at trial, the Court should take into account the merits of the class members' claims, the defenses raised by the defendant and the manageability of the trial, but "should not reach any ultimate conclusions with respect to issues of fact or law involved in the case." Knight, 469 F. Supp. 2d at 1033. Instead, the Court should determine whether the risks faced by the parties and the difficulty of trial weigh in favor of approving the settlement. Id. "The Court's role is not to engage in a claim-by-claim, dollar by dollar evaluation, but to evaluate the proposed settlement in its totality." Borcea, 238 F.R.D. at 673. Here, the likelihood of success at trial for either party was undercut by the risks, difficulty and expense of further litigation.

This is a complex case where the burden of proof shifts between the parties. Plaintiffs must first prove that USS's experience requirement has a disparate impact on females. If the plaintiffs meet this burden, USS must then prove that the requirement is job related and consistent with business necessity. If USS is successful, plaintiffs must show that less burdensome alternative means are available. Proof of these matters is complex and expensive, requiring statistical

experts and I.O. psychologists who are extremely expensive. The experts on both sides of this case had opposing views that were well thought out and argued. For this reason, neither side could be sure which view would have been ultimately accepted by the Court if this case went to trial. Thus, it is entirely possible that plaintiffs could spend significant amounts of money in this case and recover nothing. Likewise, the defendant could have spent significant amounts of money and still lost this case. See Ingram, 200 F.R.D. at 689 (noting that "plaintiffs face an uphill battle in prevailing on employment discrimination cases in federal court"). The settlement agreement is preferable to the risks of continued litigation faced by both parties.

In addition, the settlement agreement spares the parties the difficulties and risks that they would have faced in litigating the issue of damages. The federal courts have emphasized that "[i]n class actions, the 'complexities of calculating damages increase geometrically[,]'" Chatelain v. Prudential-Bache Sec., Inc., 805 F. Supp. 209, 214 (S.D.N.Y. 1992) (quoting Bonime v. Doyle, 416 F. Supp. 1372, 1384 (S.D.N.Y. 1976), aff'd, 556 F.2d 554 (2d Cir.), cert. denied, 434 U.S. 924 (1977)), and that the "risk of proving damages [can] not be eliminated until after a successful trial and exhaustion of all the appeals." In re General Instrument Sec. Litig., 209 F. Supp. 2d 423, 430 (E.D. Pa. 2001). Accordingly, federal courts routinely find that avoiding the difficulties of proving damages -- particularly

where the damages litigation will likely become an expensive battle of the experts -- is a benefit to the parties that weighs in favor of approving a class settlement. Id; In re Warner Commc'ns Sec. Litig., 618 F. Supp. 735, 744 (S.D.N.Y. 1985) (settlement approved where litigation of damages issues would be a "battle of the experts" and where it was "virtually impossible to predict with any certainty which testimony would be credited"), aff'd, 798 F.2d 35 (2d Cir. 1986).

Finally, as the federal courts have pointed out, "victory -- even at the trial stage -- is not a guarantee of ultimate success[,]" given the risks and expense of appeal. In re Milken & Assoc. Sec. Litig., 150 F.R.D. 46, 53 (S.D.N.Y. 1993). Even if plaintiffs could succeed at trial, they may still face the possibility of an appeal by USS. The appeals process would, at the very least, postpone any payment of damages for years, and could result in USS paying no damages at all. The fact that settlement allows both parties to avoid the risk and expense of further litigation is a factor in support of settlement approval.

2. The Range of Possible Recovery and the Point on or Below the Range of Possible Recovery at Which the Settlement is Fair, Adequate and Reasonable.

The Court should consider the damages that could be recovered at trial, plaintiffs' likelihood of prevailing at trial and other relevant factors to determine whether the settlement is fair to the class. Carnegie, 2004 WL 3715446, at *20; see also In re Domestic Transp. Antitrust Litig., 148 F.R.D. 297, 319 (N.D. Ga.

1993). Punitive recovery should not be considered in assessing the adequacy of the settlement. See Carnegie, 2004 WL 3715446, at *21. Where relief other than monetary compensation is a part of the settlement, the Court should consider whether that non-monetary benefit outweighs the risks of litigation. See DeHoyos v. Allstate Corp., 240 F.R.D. 269, 291 (W.D. Tex. 2007) (finding that the proposed settlement was in the best interests of the class because of the substantial and immediate benefits provided to class members, including implementation of a new policy aimed at correcting the disparate impact on minorities, the risks and length of trial in class actions, and the likelihood of appeals and subsequent proceedings if the case proceeded on the litigation track).

The settlement in this case provides an immediate benefit to the class members because they can apply for employment at USS under a new and improved hiring process aimed at correcting the alleged disparate impact. As discussed above, plaintiffs have many hurdles to jump through in order to establish liability and damages and ultimately may not recover anything from USS. Under the settlement, the class members obtain an immediate monetary benefit and also the opportunity to reapply for employment at USS if desired regardless of personal circumstances.[6] The immediate monetary recovery and opportunity to apply for employment weighs in favor of approving the settlement. See Francisco v.

[6] Linda Smith is the only plaintiff who will waive the ability to reapply for employment at USS.

Numismatic Guaranty Corp. of America, No. 06-61677-CIV, 2008 WL 649124, at *10 (S.D. Fla. Jan. 31, 2008) ("Where, as here, the injunctive relief addresses the very practices that gave rise to the suit - and indeed are at the core of the Plaintiff's goals in pursuing the litigation - a court is justified in viewing such injunctive relief as a significant component of the settlement.")

3. The Complexity, Expense and Duration of Litigation.

The complexity, expense and duration of the litigation of this case also weighs in favor of settlement. See Carnegie, 2004 WL 3715446, at *22 (finding the complexity, expense, and duration of continued litigation and possible appeals weighs in favor of the proposed settlement because expert testimony on complex actuarial methodologies would be mandatory and trial likely would consume several months and postpone conclusion of the action); In re Metropolitan Life Derivative Litig., 935 F. Supp. 286, 293-94 (S.D.N.Y. 1996) (finding that settlement would undoubtedly be in the best interest of all the parties, in light of the effort and expense that would be required to take the case to and through trial).

"The Court should consider the vagaries of litigation and compare the significance of immediate recovery by way of the compromise of the mere possibility of relief in the future, after protracted and extensive litigation. In this respect '[i]t has been held proper to take the bird in the hand instead of a prospective flock in the bush.'" Borcea, 238 F.R.D. at 674 (citation omitted). In

addition to the cost and expense of additional discovery, significant resources (including time, money, effort and expertise) will need to be expended in the summary judgment and/or trial phases of this case. The parties anticipate that extensive briefing and evidence will be needed for summary judgment and should the court deny summary judgment, extensive trial preparation will be necessary. The parties anticipate numerous pre-trial issues and a complex and lengthy trial. In addition to other things, expert expenses will be significant. Should liability be established, the determination of damages also will be time-consuming. The settlement conserves the resources of all parties and the Court, which weighs in favor of its approval. Borcea, 238 F.R.D. at 674 (approving of a settlement while recognizing that complex litigation can deplete the resources of the parties and the taxpayers).

4. The Substance and Amount of Opposition to the Settlement.

When determining whether a proposed settlement is fair, adequate, and reasonable, the Court must "examine the settlement in light of the objections raised." Cotton, 559 F.2d at 1331. In fact, the reaction of the Class to the settlement is perhaps the most significant factor to be weighed in considering its adequacy. See In re Top Tankers, Inc. Securities Litig., No. 06 CIV. 13761 (CM), 2008 WL 2944620, at *7 (S.D.N.Y. July 31, 2008). The absence of objectants and minimal exclusions militate strongly in favor of approval of a settlement. Id. The

agreement provides a monetary distribution to each class member without those class members having to bear the expense, duration and uncertainty of litigation or prove individual damages. Moreover, class members may apply for employment with USS through its new hiring process. In short, the Settlement Agreement simply gives class members little reason for objection. Indeed, no class member has objected to the settlement. This factor weighs heavily in favor of this Court's approval of the Settlement Agreement. See Francisco, 2008 WL 649124, at *12 (finding that no opposition and only two opt outs weighed in favor of approving the settlement); In re Top Tankers, Inc., Securities Litig., 2008 WL 2944620 at *7 (approving a settlement with no objection and three opt outs).

5. Stage of Proceedings at Which Settlement was Achieved.

In order to reach a fair settlement, the "parties must have an 'adequate appreciation of the merits of the case before negotiating.'" In re Prudential Ins. Co. America Sales Practice Litig. Agent Actions, 148 F.3d 283, 319 (3d Cir. 1998), cert. denied, 525 U.S. 1114 (1999) (citation omitted). Certainly, the parties have investigated the merits in this case. This matter has been litigated for almost four years. EEOC charges were filed and investigated and extensive discovery was entered into by the parties. Voluminous documents and other data were produced. Numerous witnesses were deposed. Various experts were obtained and reports compiled at great expense to both parties. Extensive arms-length mediation was

entered into before a neutral mediator. "These facts suggest that the proceedings were fairly advanced, and that the parties had sufficient opportunity to evaluate the strengths and weaknesses of the case." See Carnegie, 2004 WL 3715446, at *19 (finding proposed settlement fair because it was reached four years after the action was commenced, following extensive discovery and retained experts by both parties). The parties have had ample discovery to evaluate their positions in the case and believe this settlement agreement to be a fair resolution. Under these circumstances, the settlement should be approved.

6. Provisions in the Settlement Agreement for Payment of Class Counsel Fees and Incentive Payments.

The fee to Class Counsel in this case (which also includes expert witness fees) is reasonable in light of the time and effort that Class Counsel expended on this case and the result that has been obtained for the class. Class Counsel first filed EEOC charges in this matter over four years ago (September 9, 2004) and have been litigating the case since that time. The settlement agreement provides significant monetary recovery for the class and also changes the alleged discriminatory experience requirement at USS. This factor clearly weighs in favor of approval of the settlement.

The settlement agreement provides monetary payments to all class members and provides them with a new hiring process at USS. The settlement also provides incentive awards to the named plaintiffs which is entirely appropriate. Federal

courts "routinely approve incentive awards to compensate class representatives for the services they provided and the risks they incurred during the course of the class action litigation." Allapattah Servs., Inc. v. Exxon Corp., 454 F. Supp. 2d 1185, 1218 (S.D. Fla. 2006) (awarding $1,766,666.00 per class representative). "Incentive awards serve an important function, particularly where the named plaintiffs participated actively in the litigation." Id.

When examining awards to named plaintiffs, courts review (1) the actions taken by the class representatives to protect the interests of class members and others; (2) whether those actions resulted in substantial benefit to the class members; and (3) the amount of time and effort spent by the class representatives in pursuing the litigation. See Spicer v. Chicago Bd. Options Exch., Inc., 844 F. Supp. 1226, 1266 (N.D. Ill. 1993). See also, Carnegie, 2004 WL 3715446, at *24 (finding incentive payment fair where named plaintiffs were required to devote a substantial amount of time to prepare for and provide lengthy and personal deposition testimony); and Ingram, 200 F.R.D. at 694 (N.D. Ga. 2001) (approving approximately $300,000 for each named plaintiff as an incentive award in an employment discrimination case). In reviewing incentive awards, Courts should also consider the general public policy in favor of amicable settlement of legal disputes, which is especially favored in discrimination cases. Carnegie, 2004 WL 3715446, at *24.

Ms. Smith has been involved in this matter since at least September 9, 2004, when she filed an EEOC charge. The majority of other plaintiffs are "piggy backing" on her EEOC charge and would not have been able to bring a claim if she had not filed her charge. According to Class Counsel, Ms. Smith has been very involved in the prosecution of the action and has conferred with Class Counsel on a regular basis since 2004. She also gave deposition testimony in the case. Moreover, unlike any other class member she is waiving her right to reapply for employment at USS which is a significant benefit to USS.

Four of the other twelve plaintiffs also filed EEOC charges. According to Class Counsel, all of the named plaintiffs have provided information and assistance in the prosecution of the case. Importantly, all of the named plaintiffs have borne the risks and notoriety related to being a named plaintiff in this class action litigation, including the potential liability for USS's taxable legal costs had USS litigated this action to a conclusion in its favor. Because all class members are receiving monetary and other relief (change in the hiring process) and the named class members are receiving additional relief consistent with their roles in the case, the settlement should be approved.

"[U]niformity of relief provided to all class members supports acceptance of the proposed Settlement Agreement[]." Knight, 469 F. Supp. 2d at 1036. Class members in this case have an opportunity to share equally in the settlement fund to

be established in accordance with the settlement agreement without having to prove individual damages. Also, with the exception of Linda Smith, all class members have the opportunity to re-apply for employment at USS. The uniformity of the benefits to the class weighs in favor of the Court's approval of the settlement agreement. See Ingram, 200 F.R.D. at 690 (approving of settlement in which all class members are compensated without an individual determination).

VII. CONCLUSION

Based on the foregoing, the parties respectfully request that the Court grant the Joint Motion for Final Approval of the Class Action Settlement.

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