IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

DANIELLE WOOTEN, ROSETTA SMITH, MISTY EWING, MURTYDELL BARNES, BETTY KING, NYCOLE PRICE, LORITA THOMPSON, and KIM RICHARD, On Behalf of Themselves and All Others Similarly Situated, Plaintiffs,	)	
vs.	)	Case No. 99-0990-CV-W-3-ECF
DILLARD'S, INC.,	)	
Defendant.	)	

CONDITIONAL FINAL ORDER APPROVING SETTLEMENT

On July 5, 2001, Plaintiffs Danielle Wooten, Murtydell Barnes, Misty Ewing, Betty King, Nycole Price, Kim Richard, Rosetta Smith and Lorita Thompson ("Plaintiffs" or "Class Representatives"), acting on behalf of themselves and the putative class in the above-captioned action (the "Action"), entered into a Stipulation and Settlement Agreement and an Addendum thereto (collectively referred to as the "Settlement Agreement") in settlement of all claims in the Action (the "Settlement") with Defendant Dillard's Inc. ("Dillard's"), and thereafter applied to this Court for approval of the Settlement pursuant to Rule 23, Fed. R. Civ. P.

By Order Preliminarily Approving Class Action Settlement dated July 31, 2001 (the "Preliminary Order"), this Court, pursuant to Rule 23, Fed. R. Civ. P., granted preliminary approval to Plaintiff's motion to certify a class for settlement purposes only, such class (the "Settlement Class") to consist of::

> All African-Americans who were employed by Dillard's at Bannister Mall, Columbia, Independence Center, Indian Springs, Jefferson City, Mall of the Great Plains, Manhattan, Metro North, Mission Mall, Oak Park Mall, St. Joseph, Springfield, Topeka and/or Ward Parkway (the "Class Stores") at any time from October 13, 1994 to January 31, 2001. The Class does not include persons who have previously entered into a written settlement agreement releasing the Claims released here.

The Court also preliminarily approved Plaintiffs as Class Representatives and the selection of counsel for the Settlement Class ("Class Counsel").

Pursuant to the Preliminary Order, the Court preliminarily approved the Settlement and scheduled a Settlement Hearing for November 30, 2001 to determine, among other things, whether the proposed Settlement set forth in the Settlement Agreement should be approved by the Court as fair, reasonable and adequate. This Court ordered Class Counsel to provide notice to all persons in the Settlement Class and approved the form of the notices to be published and to be mailed to Settlement Class Members.

As attested in the Affidavit of the Settlement Administrator and the Affidavit of Class Counsel, both filed with this Court on or about October 12, 2001, the provisions of the Preliminary Order and the Settlement Agreement regarding mailing and publication of the Notices have been satisfied. Class Counsel filed Plaintiffs' Memorandum in Support of Final Certification of the Class ("Fairness Brief"), Application for Special Awards for Class Representatives, and Final Approval of the Proposed Class Settlement, including application for special awards to the Representative Plaintiffs, on or about November 14, 2001. Class Counsel filed its Application for Attorneys' Fees and Litigation Expenses on or about August 28, 2001. As attested in the Affidavit of the Settlement Administrator, no objections to the Settlement have been received, and no one requested a right to appear or an opportunity to be heard at the Settlement Hearing that was previously scheduled for November 30, 2001. There being no filed requests to appear, the parties then suggested that a hearing

was no longer necessary. However, on November 19, 2001, the Court denied the parties' informal request to cancel the hearing and outlined several issues the Court believed required further explanation and justification. One of those issues related to the amount of the Special Awards to be awarded to the Class Representatives.

Following the Court's November 19 Order, Plaintiffs informally submitted a letter intended to address the Court's concerns. A telephone conference was held with the parties on November 28. Plaintiffs' counsel were given an opportunity to present any information or arguments they desired regarding the propriety of the Special Awards. At the conclusion of the conference, the parties were told that if they were satisfied with what had been presented and had no desire to offer anything at a hearing, there would be no need to appear on November 30. The parties were also told that if they wished to augment their arguments with additional authority or evidence, they could do so; either way, the undersigned would be available in the event anyone appeared for the hearing. Plaintiffs elected to submit a letter further detailing their justifications, which was received on November 29. The named parties did not appear on November 30; neither did any Class Members.

As the Court has stated, and as the November 19 Order reflects, the focus of the Court's concern is the *amount* of the Special Awards. The justifications for awarding class representatives a special award are well-documented, are not disputed, and need not be recounted here. However, even though none of the Class Members objected, the Court still has an independent obligation to insure that the settlement is fair. The lack of objections is simply one factor to consider in conducting a fairness inquiry. In this case, the lack of objections is insufficient to justify Special Awards in the amount sought in this case.

Under the settlement, the Class Members will receive (at a minimum) between $500 and $6000 depending upon their length of employment with Defendant. The settlement calls for the Class

Representatives to received Specials Awards of $100,000 each in addition to the amount awarded under the formula for compensating Class Members – or, more than 16.5 times the highest possible award to a Class Member.

There are three factors to be considered in evaluating a special award to a class representative: "(1) the action taken by the Class Representatives to protect the interests of Class Members and others and whether these actions resulted in a substantial benefit to Class Members; (2) whether the Class Representatives assumed substantial direct and indirect financial risk; and (3) the amount of time and effort spent by the Class Representatives in pursuing the litigation." Enterprise Energy Corp. v. Columbia Gas Transmission Corp., 137 F.R.D. 240, 250 (S.D. Ohio 1991) (cited with approval in White v. National Football League, 41 F.3d 402, 408 (8th Cir. 1994), cert. denied 515 U.S. 1137 (1995)). Plaintiffs also point to the fact that some of them (but not all of them) advanced other claims that were not premised on race discrimination and surrendered them as part of the settlement. The Court agrees that this is a factor to be considered (although it does not apply to all of the Class Representatives; Plaintiffs' argument would justify a larger special award only for those Class Representatives who had other claims to surrender). Plaintiffs also suggest that the risk factor identified in Enterprise Energy is greater in an employment case than, for example, in a consumer or shareholder suit because the plaintiff in a civil rights case often has a continuing employment relationship with the defendant. This also seems reasonable, but not all of the Class Representatives continued working for Defendant during the pendency of this case. Finally, the Court notes that the third factor should be of diminished value because time spent by a plaintiff in depositions, reviewing documents, and so forth is an ordinary part of litigation. This factor is helpful in justifying an award, but it is not particularly helpful in establishing the amount of the award.

A comparison to other employment class action cases demonstrates the Special Awards

proposed in this case are excessive. In Leuvano v. Campbell, 93 F.R.D. 68 (D.D.C. 1981), the settlement called for the class members to receive $3,000. The court approved Special Awards in the amount of $8,500, and the representatives did not receive the $3,000 award. In Women's Committee for Equal Employment Opportunity v. National Broadcasting Co., 76 F.R.D. 173 (S.D.N.Y. 1977), each class member received an average of $200 in backpay while the class representatives were to receive approximately $10,625. As in Leuvano, the class representatives did not receive a distribution from the fund earmarked for the class members. In Huguley v. General Motors Corp., 128 F.R.D. 81 (E.D. Mich. 1989), the class members were to receive between $800 and $1,200, while "an additional group of eighty-eight named potential and anecdotal witnesses and named plaintiffs" would share a pool of $322,496 – for an average of less than $3,700. 128 F.R.D. at 85.

Two other cases deserve special mention. In Ingram v. Coca-Cola Bottling Co., 200 F.R.D. 685 (N.D. Ga. 2001) the court approved $300,000 for each class representative and $38,000 for class members. Despite the large sum awarded to the class representatives, it is less than eight times the amount recovered by each class member. In addition, the record documented the unique nature of the class representatives' contributions:

> A great deal of evidence has been presented to the Court regarding the unique and extraordinary contribution these four individuals made to the investigation, prosecution, and settlement of this case. That factual showing is bolstered by the testimony of Class Counsel and the mediator, who uniformly agreed that in no prior case within their experience had Class Representatives been as involved with the litigation as in this case. Of note is the fact that the four Class Representatives in this case directly participated in the mediation process and vigorously asserted the interests of the class, as Class Counsel and the mediator attested. Further, the Class Representatives took risks, bore hardships, and made sacrifices that absent class members did not. Significantly, the Class Representatives have agreed never to seek re-employment with Coca-Cola.

200 F.R.D. at 694. In this case, the Class Representatives eschewed their opportunity to make a record, preferring instead to rely upon the general principle that class representatives are entitled to

special awards because of their work in this matter. As noted earlier, this justifies an award but absent some showing of uniqueness it does not justify an award that is more than sixteen times that granted to class members.

In Roberts v. Texaco, Inc., 979 F. Supp. 185 (S.D.N.Y. 1997), the court approved special awards ranging from $2,500 to $85,000; the highest award was justified by facts demonstrating actual hardships experienced by that class representative during the pendency of the suit. Meanwhile, the average class member was expected to receive a sum between $60,000 and $80,000, and some would receive pay increases as well, demonstrating a rather reasonable ratio between the special awards and the monetary benefits to the class members. In this case, the Class Representatives have not made a particularized showing of hardship or other harm actually realized from the "risk" of their continued employment. The mere possibility of retribution or harassment is much less significant than the showing in Roberts, and cannot justify an unusually large award.

The extremely high ratio between the Special Awards sought and the highest possible recovery for class members, coupled with the lack of any particularized showing that the Class Representatives' experiences in their roles was any different than the norm results in the conclusion that the Special Awards are excessive. The Court will approve special awards of $50,000 per Class Representative, conditioned upon the parties' acceptance of the settlement on these terms, which follow in greater detail.[1] The parties (Class Representatives and Defendant) shall have twenty-one days to *file*[2] notice

[1]The balance of the money originally earmarked for the Special Awards will be placed in the Employee Allocation Fund and distributed to the class members in accordance with paragraph 40 of the Settlement Agreement.

[2]The Court emphasizes this point because there has been a disturbing trend toward presenting information to the Court via letter. This case is a class action, and it therefore possesses a heightened public interest, so the use of "off the record" means of communicating with the Court is particularly inappropriate.

of their acceptance; if all parties file their notices of acceptance, this order will become final and binding.

In accordance with the foregoing discussion, it is conditionally adjudged and decreed as follows:

1. This Court has subject matter jurisdiction over all claims of all Class Representatives and Settlement Class Members asserted in the Action, subject matter jurisdiction to approve the Settlement Agreement, and personal jurisdiction over all parties to the Action, including the Class Representatives and all other Members of the Settlement Class.

2. This Action is certified for settlement purposes only as a class action pursuant to Fed. R. Civ. P. 23(a) and (b)(3). In light of the Settlement and the parties' stipulations thereto, the Court finds and concludes that the Settlement Class meets the numerosity, commonality, typicality and preponderance requirements of the statute, and that certification of the Class is superior to other available methods for the fair and efficient adjudication of the controversy.

3. The Court finds that the Plaintiffs fully and adequately represent the interests of the Members of the Class. The Court further finds that Class Counsel collectively are experienced class action practitioners and have fairly and adequately represented and protected the interests of the Class.

4. The Class Notice for mailing, the Summary Notice for publication and the methodology set forth in the Settlement Agreement for notifying Settlement Class Members (i)constitute the best practicable notice; (ii) constitute notice that is reasonably calculated, under the circumstances, to apprise Settlement Class Members of the pendency of the Action, their right to object or exclude themselves from the proposed Settlement and their right to appear at the final Approval hearing; (iii) are reasonable and constitute due, adequate and sufficient notice to all persons entitled to receive notice; and (iv) meet all applicable requirements of Rule 23, Federal Rules of Civil Procedure, the

United States Constitution (including the Due Process Clause) and any other applicable law.

5. The proposed Settlement, as provided in the Settlement Agreement and as modified earlier in this order, is fair, reasonable and adequate, consistent and in compliance with all applicable requirements of the Federal Rules of Civil Procedure, the United States Constitution (including the Due Process Clause), and any other applicable law, and is in the best interests of the Settlement ClassMembers. No objections to this Class Action Settlement were filed. The parties and their counsel are directed to implement and to consummate the Settlement in accordance with the terms and conditions of the Settlement Agreement as modified herein. If the parties agree to the conditions imposed on page 6 of this order, the Settlement Agreement and this order will be binding on the Class Representatives and all other Settlement Class Members (other than the one person who requested exclusion), as well as their heirs, executors, administrators, successors, mortgagees, lienholders and assigns, and anyone claiming through or under them, and shall have res judicata, collateral estoppel, and all other preclusive effect in all pending and future claims, lawsuits, or other proceedings, including all forms of alternative dispute resolution, maintained by or on behalf of any such persons, to the extent those claims, lawsuits or other proceedings involved matters that were or could have been raised in this Action or were otherwise encompassed by the Release set forth in the Settlement Agreement.

6. The Class Representatives, Settlement Class Members and Dillard's shall consummate the Settlement according to the terms of the Settlement Agreement as modified herein. The Settlement Agreement and each and every term and provision thereof shall be deemed incorporated herein as if explicitly set forth and shall have the full force and effect of an order of this Court.

7. The person who has requested exclusion from the Settlement Class is listed on the attached Exhibit A (filed under seal) and shall not be subject to the terms of the Settlement nor

participate in the Settlement nor receive any benefits provided under the Settlement, and is not bound by this Final Order and Judgment.

8. Each Class Representative and each Settlement Class Member, and their respective heirs, administrators, successors and assigns, hereby release and forever discharge the Dillard's Releases (as defined in the Settlement Agreement and repeated on Exhibit B hereto) from all Compromised Claims (as defined in the Settlement Agreement and repeated on Exhibit B hereto), and covenant not to sue the Dillard's Releasees on any and all Compromised Claims.

9. All Settlement Class Members except the individual listed on Exhibit A (who elected to be excluded from the Class) are hereby enjoined from filing, commencing, prosecuting, maintaining, intervening in, participating in (as class members or otherwise), or receiving any benefits from any other lawsuit, arbitration, or administrative, regulatory or other proceeding or order in any jurisdiction based on or relating to the claims and causes of action, or the facts and circumstances relating thereto, in this Action and/or the Compromised Claims (as that term is defined in the Settlement Agreement and repeated on Exhibit B attached hereto). In addition, all other persons, their agents, servants, and attorneys who receive actual notice of the Final Order and Judgment by personal service or otherwise are hereby preliminarily enjoined from filing, commencing, prosecuting or maintaining any other lawsuit as a class action (including by seeking to amend a pending complaint to include class allegations, or by seeking class certification in a pending action in any jurisdiction) on behalf of Settlement Class Members who have not timely and properly elected to be excluded from the Settlement Class, if such other class action is based on or relates to any of the claims and causes of action, or the facts and circumstances relating thereto, in this Action and/or the Compromised Claims (as that term is defined in the Settlement Agreement and repeated on Exhibit B hereto).

10. If the parties accept the conditions imposed by the Court, this Action will be dismissed with prejudice without an award of Court costs except as provided in the Settlement Agreement and approved herein, and all Compromised Claims, as defined in the Settlement Agreement and repeated on Exhibit B hereto, are hereby extinguished.

11. Jurisdiction is hereby retained as to all matters related to administration, consummation and enforcement of the Settlement hereby approved, including, without limitation, issues of compliance or non-compliance with the terms and conditions of the Settlement.

12. Neither this Final Order and Judgment nor any other Order in this Action nor the Settlement Agreement: (a) is an admission or concession by Dillard's of any actual or potential fault, omission, liability or wrongdoing, or (b) is a finding or determination of the validity or invalidity of any claims in the Action or of any wrongdoing by Dillard's. In no event shall the Settlement Agreement, or any of its provisions or exhibits, or any negotiations, statements, court proceedings or court orders relating to its provisions, in any way be construed as, offered as, received as, used as or deemed to be evidence of any kind in any action, or any judicial, administrative, regulatory or other proceeding, except a proceeding to consummate or to enforce the Settlement Agreement, the Settlement or the Judgment. Without limiting the foregoing, neither the Settlement Agreement nor the Settlement nor any related negotiations, statements, Court proceedings or Court Orders shall be construed as, offered as, received as, used as or deemed to be evidence or an admission or concession of any liability or wrongdoing whatsoever on the part of any person or entity, including, but not limited to, Dillard's or any of the Dillard's Releasees, or as evidence or an admission or concession against Dillard's or any of the Dillard's Releasees relating to class certification, or as a waiver by Dillard's or any of the Dillard's Releasees of any applicable defense, including, without limitation any defense on the merits or against class certification.

13. Plaintiffs' Application for Approval and Authorization of Payment of Attorneys Fees and Expenses (Doc.# 143) is granted. In making this decision, the Court notes that in a case where the attorneys' work has generated a "common fund" for the benefit of the plaintiffs, a court has the discretion to use the "percentage of the fund" methodology instead of the lodestar method to evaluate and award fees. Petrovic v. Amoco Oil Co., 200 F.3d 1140, 1157 (8th Cir. 1999). The Court holds that the percentage of fund approach is more appropriate than the lodestar method in this case precisely because counsels' efforts were instrumental in generating a fund that is to be distributed to a class of employees. The Settlement Agreement calls for Class Counsel to receive $1,350,000.00, which represents between 20% and 30% of the settlement value – a range that is often described as permissible. E.g., id. The Court also finds this sum is fair and reasonable in light of Class Counsels' experience and efforts in this case, as well as the result that has been achieved. Accordingly, Class Counsel is awarded attorneys' fees in the amount of $1,350,000.00. In addition, the Court approves reimbursement of Class Counsels' litigation expenses in the amount of $50,000.00.

In making this decision, the Court is relying exclusively on the percentage of the fund approach for awarding fees. Therefore, nothing in this order should be construed as approving the reasonableness of the hourly rates or the time spent on the case as reflected in the materials Class Counsel submitted for calculating the lodestar.

14. In the event an appeal is taken challenging only the awards of attorneys' fees, litigation costs and expenses, or special awards to the Class Representatives but no appeal is taken challenging any other aspect of this Settlement, then the Settlement Agreement and this Order shall be final and binding as to all aspects of the Settlement other than those that are the subject of the appeal. Any appeal challenging only the Order awarding attorneys' fees, litigation costs and expenses and/or special awards to the Class Representatives shall have no effect on the finality of the settlement for

the class as a whole or the distribution of funds to the class as a whole.

15. If (a) the Settlement is terminated for any reason whatsoever in accordance with the Settlement Agreement, (b) one or more parties fail to file their consent to the modifications made by the Court in this order, or (c) the approval of the Settlement by the Court is ultimately reversed on appeal, then: (a) the Settlement Agreement and each and every provision thereof shall have no further force or effect of any kind; (b) the parties shall stand in the same position as to every issue of fact and law as they did on the date prior to the execution of the Settlement Agreement (including the issue of whether a class may be certified) as though the Settlement Agreement was never entered into; (c) any and every order entered pursuant to the Settlement Agreement (including the Order Preliminarily Approving Class Action Settlement, and this Final Order and Judgment) shall be vacated and of no further force or effect; and (d) any class certified for settlement purposes shall be decertified, subject and without prejudice to the ability of any party to file (or oppose) a motion to certify a class or classes for purposes of discovery, pre-trial and trial.

IT IS SO ORDERED.

/s/ Ortrie D. Smith
ORTRIE D. SMITH, JUDGE
UNITED STATES DISTRICT COURT

DATE: December 7, 2001

EXHIBIT B

Compromised Claims means

a) with respect to the Settlement Class, and their respective heirs, executors, administrators, successors and assigns, as against Dillard's, and all its subsidiaries, and all of the past and present officers, directors, employees, attorneys, insurers, representatives and agents of Dillard's and all its subsidiaries, and the heirs, executors, administrators, successors and assigns of the foregoing or any of them (collectively "Dillard's Releasees"), any and all liabilities, actions, indebtedness, obligations, claims, causes of action, suits, damages, demands, taxes, costs and expenses whatsoever, of every kind and nature, known or unknown, disclosed or undisclosed, whether or not known or contemplated, whether in law or in equity, relating to the Claims or the Action, including the defense and settlement thereof;

b) with respect to the Plaintiffs, and their respective heirs, executors, administrators, successors and assigns, as against the Dillard's Releasees, any and all liability, actions, indebtedness, obligations, claims, causes of action, suits, damages, demands, taxes, costs and expenses whatsoever, of every kind and nature, known or unknown, disclosed or undisclosed, whether or not known or contemplated, whether in law or in equity, arising out of any act, omission or transaction that shall have happened, occurred or arisen prior to and including the date of this Stipulation and Settlement Agreement; and

c) with respect to Dillard's, it successors and assigns, as against the Plaintiffs, Class Counsel, and all of their respective heirs, executors, administrators, successors and assigns and attorneys, and any person, firm, organization, corporation, partnership or entity liable by, through, under or on behalf of any of the foregoing Plaintiffs, any and all liabilities, actions, contracts, indebtedness, obligations, claims, causes of action, suits, damages, demands, taxes, costs and expenses whatsoever, of every kind and nature, known or unknown, disclosed or undisclosed, whether or not known or contemplated, whether in law or in equity, relating to the Claims or the Action including the prosecution and settlement thereof.

Claims means any and all claims of race discrimination, including but not limited to all claims for a pattern and practice of race discrimination and/or claims for race discrimination in hiring, pay, promotion, job assignments, terms and conditions of employment, termination, and /or claims for racial harassment and hostile environment, and whether or not based on allegations of disparate treatment or disparate impact.