IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
LUFKIN DIVISION

SYLVESTER MCCLAIN, on his own behalf and on behalf of a class of similarly situated persons, et al.,	§	
Plaintiffs,	§	CIVIL ACTION NO. 9:97-CV-063
vs.	§	
	§	JUDGE CLARK
LUFKIN INDUSTRIES,	§	
Defendant.	§	

DEFENDANT LUFKIN'S POSITION ON DISPUTED ISSUES
FOR INJUNCTIVE RELIEF

At the Status Conference on December 5, 2008, the Court ordered the Parties to confer on a "methodology on injunction" and advise the Court on those issues on which they were in agreement (which have been identified in the Parties Joint Report on Injunctive Relief) and identify those issues on which they were not in agreement.

In agreeing to the character of certain remedial relief if an injunction is necessary, Lufkin has expressly reserved its right to challenge the need for injunctive relief based on the Fifth Circuit's determination that only the Thomas charge supports the class claims (which Lufkin contends changes the liability period to no earlier than April 2, 1996) and the changed circumstances reflected in promotion data to 2007-2008. Notwithstanding Judge Cobb's liability findings, Lufkin believes the data analysis since trial establishes conclusively that there is no statistically significant shortfall in African-American salaried promotions in any relevant time period.

To establish liability, Plaintiffs' expert found a shortfall of 8.85 promotions in salaried positions between 1994 and 2002 at -2.02 standard deviations, which just meets the 5 percent level of statistical significance. Had Plaintiffs' analysis been done for any other time period: from 1996 to 2002 (which would have been the appropriate time period had Buford Thomas' EEOC charge been used; 1994 to 2008, 1996-2002, 2000-2007, or 2003-2007, there would have been no statistically significant shortfall in African-American salaried promotions. Even Plaintiffs' expert concedes that there have been no lost promotions in salaried jobs since the time of trial (based on his calculation of zero damages in that period for salaried promotions).

Years	Total Number of Promotions	Total Number of Black Promotions	Disparity	Number of Standard Deviations
1994-2002	386	34	-8.85	-2.02
1994-2008	639	72	-7.93	-1.61
1996-2002	290	28	-6.35	-1.62
2000-2007	335	47	-1.02	-.034
2003-2007	256	39	0.91	0.41

While there have been some lost hourly promotions since the time of trial, using Plaintiffs' expert's methodology, which the district court accepted, the number of lost promotions has been steadily declining. Thus, certainly as to salaried promotions, and, possibly, given the changes occurring since trial and during the period that Lufkin believes is the appropriate period to measure liability for hourly promotions,[1] the need for far-reaching injunctive relief has been tempered.

In this light, Lufkin also disagrees with the Plaintiffs on the following issues:

[1] Since 2003, Lufkin's recordkeeping for hourly promotions has been dramatically improved, thus permitting analysis of active data which the courts universally accept as the preferred method.

1. **Whether employees should first make complaints to Lufkin's Human Resources department or their union before complaining to the Ombudsperson**. While the Parties have agreed that the ombudsman would have authority to receive, investigate provisionally, determine and recommend measures to resolve complaints from Lufkin employees regarding Lufkin's non-compliance with Court-ordered relief and from African-American employees regarding promotion and promotion-related discrimination, the Parties disagree as to whether employees should first make complaints to Lufkin's Human Resources department or their union before complaining to the ombudsperson. From Lufkin's prospective, the Court should foster, not circumvent, a culture which encourages employees to look to Human Resources or their union when they have problems.

With respect to the unions, this is especially important because the unions are the statutorily-recognized representatives of Lufkin's hourly employees. *People Who Care v. Rockford Bd. Of Educ. Sch. Dist. No. 205*, 961 F.2d 1335, 1337 (7th Cir. 1992) (even though school district had been found to violate the Constitution, it was improper for district court to approve consent decree that conflicted with provisions of collective bargaining agreement without giving the union a hearing). In order not to infringe the union's statutorily protected relationship with its members, the ombudsperson should first ask the complaining employee if he had complained to his union about any denied promotion and postpone consideration of any complaint until the employee has first given his union an opportunity to represent him consistent with its statutory duty and then determines that the union has not been properly responsive.

While not statutorily required, salaried employees should also be encouraged to first bring their concerns to Lufkin's Human Resources department. If Lufkin and the employee are unable to resolve the complaint on their own, and only then, should the ombudsman become

involved in individual employee complaints. Thus, if an employee has a complaint, the remedial measures in the injunction should give Lufkin an opportunity to respond to the employee's complaint either by providing the employee with additional information or, if the complaint has any basis, correcting the problem. Ultimately, since the goal is to develop internal mechanisms that will not require continued court supervision, having Lufkin respond first encourages the appropriate remedial action and develops the processes the Court wants established.

In the event that an employee complains to the ombudsperson without first bringing his complaint to Lufkin or the unions, the ombudsperson should first instruct the employee to complain about his denied promotion to Lufkin or his union. Lufkin is not be opposed to the ombudsperson advising employees, if they are not satisfied with Lufkin's or union's response, to then bring the complaint to him.

2. **Whether the Ombudsperson should have authority to receive complaints of alleged discrimination regarding employment practices unrelated to promotions or non-compliance with the court's injunction**. The Parties are in disagreement as to scope of the ombudsperson's authority to hear complaints. Plaintiffs prevailed on a single claim of disparate impact discrimination against blacks in promotions. Therefore, the ombudsperson should be limited to receiving and investigating complaints of black employees who believe that they have been discriminated against in promotions. The ombudsperson should consider discrimination in other practices of employment if and only that discrimination was *directly related* to the denied promotion. *See United States v. Criminal Sheriff*, 19 F.3d 238, 239-40 (5th Cir. 1994) (injunction narrowed to only address discriminatory job assignments because it was the only practice at issue). For example, if Lufkin took the position that an employee had not received a promotion because he had been disciplined, the ombudsperson could investigate if this were the case and, if

so, if race was implicated in the disciplinary decision. On the other hand, if an employee simply complained that he had been disciplined because of his race, the ombudsperson would not have authority to investigate although he could advise the employee of his right to file a charge of discrimination with the Equal Employment Opportunity Commission.

3. **Whether an analysis of Lufkin's promotion data should be conducted every six months or annually, and what type of analysis should be conducted by the ombudsperon**. The Parties agree that the ombudsperson should provide the Court with reports on the promotion data that he receives from Lufkin along with any analyses that he has conducted on that promotion data. The Parties, however, disagree on the frequency of these reports, and more important, the type of analysis that the ombudsperson should conduct on this data.

As noted at the beginning of this submission, Plaintiffs' own analysis reveals no lost promotions in salaried promotions and a declining number of lost promotions in hourly promotions. No doubt recognizing that the ombudsperson is unlikely to find a statistically significant discrepancy in Lufkin's promotion data, Plaintiffs are opposed to limiting the ombudsperson to reporting "statistically" significant disparities in promotions and propose instead a looser undefined standard. While Lufkin has no objection to the ombudsperson conducting independent statistical analyses of Lufkin's promotion data, the Court should require the ombudsperson to apply the same statistical tools that the court would accept during trial for analyzing the data and only report to the Court any "statistically significant disparities" as opposed to perceived disparities. *See Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 655 (1989) ("Since the statistical disparity relied on by the Court of Appeals did not suffice to make out a prima facie case, any inquiry by us into whether the specific challenged employment

practices of petitioners caused that disparity is pretermitted… ."); *MacRae v. McCormick*, 458 F. Supp. 970, 980 (D.D.C. 1978) (evidence of disparity without evidence bearing on statistical significance is "of little probative value"), *aff'd mem.*, 69 Fair Emp. Prac. (BNA) 320 (D.C. Cir. 1979).

While less controversial, Lufkin would also propose that the statistical analysis be conducted annually as opposed to every six months because an annual review would be based on more information and would more likely yield an accurate picture of whether the remedial measures are having the desired effect of reducing subjectivity in Lufkin's promotion practices.

4. **Whether managers should be evaluated on equal employment opportunity metrics.** Plaintiffs have proposed that Lufkin develop performance "metrics" related to equal employment opportunity for manager accountability to be used to evaluate managers and as a factor in setting their compensation. Lufkin is opposed to the Court, through its injunction, effectively requiring supervisors and managers to meet certain goals in promotions as that presumes that Lufkin is obligated to meet specific quotas in promotions, which it is not. Nor does Lufkin believe that the Court, through its injunction, become a super Board of Directors dictating Lufkin's evaluation and compensation practices (both of which were included as practices the class was certified to pursue and both of which Plaintiffs abandoned, offering no evidence of any disparate impact in evaluation or compensation systems for supervisors or managers).

In taking this position, Lufkin is not suggesting that it would ignore valid discrimination complaints against particular supervisors or managers or would disregard supervisors or managers who failed to follow Lufkin's policies and procedures. Lufkin agrees that appropriate disciplinary action should be taken in such situations, but that such issues are not properly

regulated by an injunction directed to evaluation and compensatory systems. Such matters are more properly addressed to Lufkin in show cause or contempt proceedings with respect to its failure, if any, to endure compliance with the Court's injunction as to promotion procedures.

5. **Whether the Court's injunction should remain in effect for two years with an option to extend, or for seven years**. Again for the reasons set forth initially, there is no justification for the court to retain jurisdiction for another seven years when the liability findings were based on a period that ended in 2002, and there is been no statistically significant disparities in salaried promotions since the that time, and minimal disparities in hourly jobs. The court should retain jurisdiction for another two years. In the event that the ombudsperson finds continued disparate impact in promotions during the next two years, then the Court properly will consider a motion from Plaintiffs to extend the period of injunction. Otherwise, there is no reason for continued oversight beyond 2011.

Defendant Lufkin's recommendations regarding injunction relief and comments herein are without prejudice to its reservation of right to challenge the Court's underlying liability findings based on the Fifth Circuit's decision that Sylvester McClain did not exhaust administrative remedies and that changed circumstances make injunctive relief as to salaried promotions unnecessary.

Respectfully submitted,

/s/
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CERTIFICATE OF SERVICE

I certify that on this 19th day of February 2009, a copy of the foregoing document was filed electronically through the Court's CM/ECF System and was automatically copied to Plaintiffs through the Court's electronic filing system.

/s/
Attorney for Defendant