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.	§	

JOINT REPORT ON DAMAGES

At the status conference on December 5, 2008, the Court ordered the parties to confer regarding a "base number for damages" and advise the Court on those issues on which they were in agreement and identify those issues on which they were not in agreement.

Plaintiffs' expert, Richard Drogin, has calculated damages for Plaintiffs in a manner consistent with Plaintiffs' understanding of the Court's instructions at that conference (i.e. without interest, and separately for various portions of the liability period to be determined by the Court). Plaintiffs provided Dr. Drogin's initial damages estimates to Lufkin on December 15, 2008. After Lufkin's experts reviewed theses estimates, Lufkin requested additional back up data to analyze Plaintiffs' estimates, which was provided on January 6, 2008. The purpose of this exchange of data was to quantify the amount at stake with regard to the various potentially disputed damages issues, to determine whether some could be compromised on a pragmatic basis given the possible outcomes of the disputed issues, and to identify those not worth arguing about because of the limited amounts involved. The analytical work involved in this process was detailed and somewhat time-consuming. In the course of this process, the parties have conducted

several further telephonic conferences, one of which included the respective experts who were able to communicate directly about technical issues.

The base damages (without interest) calculated by Dr. Drogin are:

Time Period	Hourly Job Damages	Salaried Job Damages	Total Damages
1994-1995	$ 669,543	$ 132,458	$ 802,001
1996-2002	$3,252,289	$ 393,336	$3,645,625
2003-2004	$ 831,335	$ 0	$ 831,335
2005-2008	$ 298,701	$ 0	$ 298,701
TOTAL	$5,051,890	$ 525,824	$5,577,662

Proceeding from Dr. Drogin's damage calculations, and after conferring on several occasions about the issues involved, the amounts at stake with regard to each of the issues, and the possibility for compromise, the parties advise the Court as follows:

1. Dr. Drogin's initial calculations double-counted the damages for promotions from hourly positions to salaried positions by including such damages in both the hourly damages and salary damages calculation. The parties agree that the double counting should be eliminated from either the hourly or the salaried job damages totals. Lufkin calculates that this will reduce total damages claimed by Plaintiffs by approximately $310,000. Plaintiffs are in the process of confirming this amount and discussing from which damages number it should be deducted.

2. Dr. Drogin's damages analysis did not use the same methodology Dr. Drogin used for his liability findings in accounting for seniority. In his liability analysis, the applicant pool consisted only of those employees with equal or greater seniority than the successful applicant, whereas in his damages model he disregards seniority. Dr. Drogin did not control for seniority in the damages calculations because of the relatively high level of complexity involved in using such a control, and methodological issues. Because Lufkin estimates that the reduction in damages attributable to this difference in methodology would not justify the expense of the

complicated analysis necessary to compute the difference and having it confirmed by Dr. Drogin, for this purpose Lufkin does not object to Dr. Drogin's methodology in eliminating seniority from the damage calculation.

3. Dr. Drogin's damages calculation includes damages for the period 1994 through 1995. The parties previously advised the Court in chambers that the appropriateness of damages for this period (actually the period from March 6, 1994 through April 2, 1996) was challenged by Lufkin based upon the Fifth Circuit's determination that Sylvester McClain did not properly exhaust administrative remedies for the class and the applicable time period based on the exhaustion of such remedies by Buford Thomas runs from a later date. Plaintiffs contend that this issue was settled by the Fifth Circuit's affirmance of Judge Cobb's rulings with respect to the applicable time period and the number of promotions to be used in calculating damages, and its denial of Lufkin's petition for rehearing on this specific issue. The difference in damages attributable to the disputed time period that may be subject to limitations is at least $950,000, and the parties disagree on whether this amount is properly included in damages. This is a legal issue that would not require any evidentiary hearing but one on which, along with others that may remain after further discussions of the parties, the parties wish to submit briefs and present such oral argument as the Court may receive.

4. Dr. Drogin's damages calculation includes the period 2003 through 2008, including damages of approximately $1,130,000 for the time period. The period 2003-2004 was before the entry of Judge Cobb's decision but after the cut off date used in the analyses submitted by the parties at trial. The period 2005-2008 is after Judge Cobb's decision. Using discovery taken on remand from the Fifth Circuit's decision, the Plaintiffs now have, and have analyzed, the same or equivalent employee databases for the 2003-2007 period. Lufkin also

advised the Court in chambers that damages for this 2003-2008 time period, for which no evidence was taken during trial nor were any liability findings made by the District Court, are not appropriate. Lufkin believes that if evidence is taken regarding this time period, it will show that there is no unlawful disparate impact in the hourly or salaried promotions. Plaintiffs' position is that the Court did enter findings of discrimination based on evidence about the period through trial (which ended in October 2004) although that evidence did not include post-2002 employee data; and that an analysis of the data for 2003-2007 would show that the effects of the discriminatory practices found by the District Court and affirmed by the Fifth Circuit continued during that period. The parties disagree regarding liability and damages for the period. Lufkin submits that if the Court were to consider damages for this period, an evidentiary hearing would be required. Plaintiffs submit that any such hearing could be limited to data analyses showing the quantitative effects of Lufkin's continuing practices. The parties wish to brief and argue this issue, whether or not the Court conducts an evidentiary hearing.

5. Dr. Drogin's damage calculations attributable to years subsequent to the year of promotion (i.e., differentials in compensation between otherwise similarly situated individuals in the promoted and non-promoted groups following the promotion decisions determined by the Court to be included in the damages calculations) include a condition that the difference in wages is calculated considering only those employees who worked 1500 hours or more during the year and who were active at year-end. This condition was not imposed by Dr. Drogin for the year of promotion. Lufkin estimates that the failure to impose this condition overstates damages by approximately $1,200,000 in the aggregate for all years and approximately $625,000 for the period 1996 through 2002. The parties disagree as to whether this amount should be included in the damages, but continue to discuss a compromise on this issue. If not resolved, Lufkin

believes that the Court should have an evidentiary hearing on this issue; Plaintiffs reserve their position on the need for such a hearing pending further and ongoing analysis of the rather complicated technical issues involved. The parties are continuing to explore alternative analyses and possible compromise on this issue.

6. Dr. Drogin's damage calculations include an attrition factor in which damages in subsequent years the damages are reduced proportionate to the number of promoted employees leaving the workforce. If an employee returns to the workforce, however, Dr. Drogin no longer mitigates the damage as a result of the promoted employee leaving. Lufkin estimates that this overstates the damages in the amount of approximately $1,120,000 in the aggregate and $620,000 for the period 1996 through 2002. The parties disagree as to whether this amount should be included in the damages, but continue to discuss a compromise on this issue. If not resolved, Lufkin believes that the Court should have an evidentiary hearing on this issue; Plaintiffs reserve their position on the need for an evidentiary hearing pending further and ongoing analysis of the rather complicated issues involved.

7. Dr. Drogin's damage calculations do not take into account any jobs where African Americans are over selected for promotion or any years in which employees who were not promoted earn more than those promoted. The effect of this methodology, is that Dr. Drogin calculates damages as if the shortfall were 216 for hourly employees and 14 for salaried employees. Lufkin contends this is inappropriate in light of the Fifth Circuit's determination that the shortfall in promotions for hourly employees was 127 and for salaried employees 8. Plaintiffs contend that damages calculations, unlike the liability calculations previously performed by Dr. Drogin, appropriately exclude those situations where despite the existence of a pattern of discrimination with adverse impact, in particular instances there was no financial

injury. Lufkin estimates this overstates the damages by approximately $1,200,000 in the aggregate and approximately $900,000 for the time period 1996 through 2002. This is a legal issue that would not require any evidentiary hearing but the parties would like to submit briefs and present such argument as the Court wishes to hear.

8. As the parties have previously advised the Court, they are in disagreement as to the appropriate interest rate to be applied to damages. The Court noted this issue at the December 5 conference. The parties wish to submit briefs and present such argument as the Court wishes to hear on this subject.

9. As a result of the foregoing issues (after taking into account the parties' agreement that double counting of promotions should be eliminated), the parties' disagreement as to damages is limited to issues that significantly affect the damages calculation. The parties are continuing to conduct and exchange analyses of the data and to discuss the issues with the goal of either eliminating, narrowing, or at least clarifying the issues that remain for resolution. If the parties are unable to reach further agreement on all issues on or before March 13, 2009, the parties recommend that the Court order simultaneous briefing on the areas of disagreement to be filed by March 31, 2009, and set the matter for further hearing thereafter. If the Court accepts this recommendation, the parties would advise the Court by March 13, 2009 what issues remain for resolution so that the Court can schedule such proceedings as it finds appropriate.

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