IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF TEXAS

LUFKIN DIVISION

Sylvester McClain, et al. Plaintiffs, v. Lufkin Industries, Inc. Defendant.	§ § § § § § § § § § §	Civil Action No. 9:97 CV 063 (CLARK) Hearing Date: None scheduled

PLAINTIFFS' BRIEF ON DISPUTED CLASS BACK PAY ISSUES

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Plaintiffs submit this Memorandum on the back pay (or damages) issues that have not been resolved by the parties, which are submitted to the Court.

STATEMENT OF QUESTIONS PRESENTED

Before turning to the submitted issues, Plaintiffs note their understanding of the back pay-related issues that do *not* have to be decided by the Court, because the parties have either agreed on their resolution, or agreed on methods for implementing the rulings that the Court is requested to make on disputed issues. The matters on which the Court need not rule are:

1. Whether class back pay should be awarded for promotions to hourly positions during the period 1996-2002.[1] The parties agree that it must be awarded.

2. The amount of class back pay that will be awarded for whatever liability periods the Court determines. The parties have largely agreed on appropriate methods for calculating back pay for each of the liability periods at issue. Once the Court has decided what the liability periods are, the parties believe they can submit to the Court amounts of class back pay to be incorporated into a judgment, which would be entered after such submissions.

3. A method for distributing class back pay among eligible class members. The parties believe they will be able to agree on a recommended plan for distribution of any back pay award once the liability periods and amounts of class back pay have been determined.

The Court should now resolve three questions:

I. For promotions to hourly positions, should the liability period include the following years: (A) 1994-1995; (B) 2003-2004; and (C) 2005-2007?

II. For promotions to salaried positions, should the liability period include 1994-2002, 1996-2002, or no period at all?

III. What rate of pre-judgment interest should apply to the class back pay award(s)?

[1] Plaintiffs understand the period included in these years to be January 1, 1996 to December 31, 2002. It is not feasible to open the period on any later date in 1996 because calculations based on the available data and analyses of it by the parties' experts have focused on full-year data only. We do not believe defendant's position is otherwise; but if it is, we reserve the right to dispute that position.

We address each of these issues below.

STATEMENT OF RELEVANT FACTS AND RULINGS IN THE CASE

In his Amended Final Judgment entered August 29, 2005 (Dkt. 552), Judge Cobb found that defendant Lufkin Industries, Inc. ("Lufkin") had committed actionable discrimination against the class with respect to both initial assignments and promotions. (*Id.* at 19-30.) In the course of reaching this decision, Judge Cobb carefully considered the testimony and statistical analyses offered by the parties' expert witnesses – Dr. Richard Drogin for the plaintiffs, and Dr. Mary Baker for Lufkin – and on every significant disputed matter found that Dr. Drogin's analyses were more accurate and/or more persuasive. (*Id.* at 24-30.) Based on these findings, Judge Cobb ordered that back pay be awarded to the class for both initial assignment discrimination and promotion discrimination, and that the award should be made on a formula basis because more individualized determinations of entitlement would be impracticable or impossible. (*Id.* at 31-33.) Judge Cobb then specified some of the elements of a formula to be used in calculating the class back pay award, based on average hourly pay rates of similarly situated African American and white employees as determined by Dr. Drogin (*id.* at 33-36), held that "Pre-judgment interest is to be awarded in the amount of 5%, compounded annually" (*id.* at 34), and using these input factors (and relying on calculations provided to the court by plaintiffs in the form of a declaration of Dr. Drogin) awarded $3,400,139 (plus interest) in class back pay (*id.* at 38).

Lufkin appealed to the Fifth Circuit from the district court's liability determinations. Lufkin successfully argued to the Fifth Circuit that no relief could be awarded based on plaintiffs' initial assignment discrimination claim because no timely filed charge of discrimination raised the initial assignment issue on an adverse impact theory. *McClain, et al. v. Lufkin Industries, Inc.*, 519 F.3d 264 (5th Cir. 2008), Slip Op. filed in this Court as Dkt. 579, at 4-9. However, the Court of Appeals affirmed Judge Cobb's findings of classwide discrimination in promotions to hourly and salaried positions, and his determination that Lufkin must be held liable for damages for such discrimination. (*Id.* at 10-18.) The Court specifically affirmed Judge

Cobb's determinations that Dr. Drogin and his findings were correct, and were more credible than Dr. Baker and hers. (*Id.* at 16-18.)

Lufkin also appealed from Judge Cobb's judgment insofar as it used a formula in awarding class back pay and directed that a "formula-driven approach" could properly be used. (*Id.* at 20.) The Fifth Circuit rejected Lufkin's contentions. (*Id.* at 18-20.) However, the Court found that the district court's "lost wages calculations" based on hourly salary differentials was not a correct approach, and vacated and remanded the back pay determination for implementation of a different approach to the damages calculation, which it outlined in general terms. (*Id.* at 20-21.)[2] The Court directed, "On remand, the district court will be dealing solely with damages attributable to approximately 127 lost promotions in hourly pay grades and nine lost salaried promotions." (*Id.* at 20.) That is the number of promotions that Dr. Drogin had calculated, and Judge Cobb had found, as the shortfall resulting from Lufkin's promotion discrimination from March 6, 1994 through the end of 2002, by the methods Dr. Drogin used in testifying on liability issues at trial. (*See*, Drogin, Statistical Analysis of Racial Patterns in Lufkin Workforce (October 27, 2003), admitted into evidence as Plaintiffs' Exhibit 1 at trial ("Drogin Report"), ¶¶ 43 and 53; and Am. Final J. (Dkt. 552) at 27, 29.)

Lufkin did not appeal from the district court's ruling that the award should carry interest at a rate of 5% compounded annually.

Lufkin filed a petition for rehearing of the panel decision. In that petition, it specifically raised the issue that, because the Court had found the 1995 McClain EEOC charge did not support the promotion discrimination claims, and those claims could only be properly founded on the 1997 Thomas charge, it was erroneous to uphold liability and grant relief for the years 1994 and 1995, which are outside the 300 day period prior to the filing of Thomas's charge. The

[2] The parties have followed that prescription in their calculations and exchanges during the remand phase. Because the Fifth Circuit's prescription was general and left certain detailed method questions unanswered, several disputes over calculation method developed. However, the parties have reached agreement on how to resolve them, once the Court decides the liability period issues that have not been resolved.

Fifth Circuit denied that petition. Lufkin then filed a petition for writ of certiorari to the United States Supreme Court raising that same issue. The Supreme Court denied certiorari in October 2008. The present remand followed.

Since the December 5, 2008 Scheduling Conference on remand, the parties have exchanged calculations and proposals regarding back pay. As stated above, the parties have reached agreement on how to resolve many of the issues. Pursuant to an agreement of the parties, they exchanged expert witness' declarations containing their respective proposals for how to calculate class back pay, and commenting on the other side's proposed methods, on April 14, 2009. Although some of the issues disputed in those declarations have in the last few days been resolved, plaintiffs submit the Declaration of their expert, Dr. Richard Drogin, as an attachment to this Memorandum. Dr. Drogin's Declaration sets out how plaintiffs believe the back pay calculations should be done most correctly (not taking into account compromises recently reached by the parties), as well as the amounts of class back pay that would be awarded for each disputed period, for hourly and salaried positions, under those calculation methods.

ARGUMENT

I. General Principles of Law Applicable to Resolution of the Questions Presented Require an Ample Monetary Remedy as Ordered by Judge Cobb.

A. The Back Pay Remedy.

Title VII's strong remedial and make-whole purposes require that courts of equity[3] employ back pay awards (and the prospect thereof) both to induce employer compliance with the Act and to fully compensate victims of employer non-compliance. *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 417-18 (1975). Thus, where a court has found discriminatory practices in a class action, there is a strong presumption in favor of class back pay. *Pettway v. Am. Cast Iron*

[3] Back pay is an equitable remedy under Title VII. *Allison v. Citgo Petroleum Corp.*, 151 F.3d 151 F.3d 402, 415-16 (5th Cir. 1998); *Pettway v. Am. Cast Iron Pipe Co.*, 494 F.2d 211 (5th Cir. 1974)

Pipe Co., 494 F.2d 211, 259 (5th Cir. 1974);[4] *Sellers v. Delgado Cmty. Coll.*, 839 F.2d 1132, 1136 (5th Cir. 1988). In a class action where discrimination has been found, "Two general premises apply to the computation of a back pay award: (1) unrealistic exactitude is not required, and (2) uncertainties in determining what an employee would have earned but for the discrimination should be resolved against the discriminating employer." *Shipes v. Trinity Inds.*, 987 F.2d 311, 317 (5th Cir. 1993). Moreover, where a defendant's "argument [that back pay should not be awarded] is nothing but an attempt to relitigate whether discrimination occurred at all," the court "must reject it." *Stewart v. Gen. Motors Corp.*, 542 F.2d 445, 452 (7th Cir. 1976).

B. Law of the Case.

Where an appellate court has already decided "a factual or legal issue," that decision is "the law of the case and must be followed in all subsequent proceedings in the same case in the trial court." *Cooper Tire & Rubber Co. v. Farese*, 248 F. App'x. 555, 558 (5th Cir. 2007) (*quoting Lyons v. Fisher*, 888 F.2d 1071, 1074 (5th Cir. 1989)); *Quest Med. Inc. v. Apprill*, 90 F.3d 1080, 1094 (5th Cir. 1996) ("The law of the case doctrine precludes reexamination of issues decided on appeal . . .", *citing Conway v. Chemical Leaman Tank Lines, Inc.*, 644 F.2d 1059, 1061 (5th Cir. 1981)). "Subject to a few narrow exceptions, the law of the case controls legal claims which were fully litigated and decided in the first appeal, even if parties seek to introduce new legal or factual evidence on remand."[5] *Cooper Tire & Rubber Co.*, 248 F. App'x. at 558 (*citing Office of Thrift Supervision v. Felt*, 255 F.3d 220, 225 (5th Cir. 2001)).

> [This] rule is based on the salutary and sound public policy that litigation should come to an end. It is predicated on the premise that "there would be no end to a suit if every obstinate litigant could, by repeated appeals, compel a court to listen to criticisms on their opinions or speculate on chances from changes in its

[4] The Fifth Circuit cited and relied principally on *Pettway* in the back pay portion of its decision in this case. (Slip Op. at 18-19.)

[5] The "narrow exceptions" under which courts have discretion to ignore the law of the case occur "if substantially different evidence has been presented, there has been an intervening change in the law, or the prior decision was clearly erroneous and it would work a manifest injustice." *Cooper Tire & Rubber Co.*, 248 F. App'x at 558 (*quoting Browning v. Navarro*, 887 F.2d 553, 556 (5th Cir. 1989)).

> members," and that it would be impossible for an appellate court "to perform its duties satisfactorily and efficiently" and expeditiously "if a question, once considered and decided by if were to be litigated anew in the same case upon any and every subsequent appeal" thereof.

Paul v. United States, 734 F.2d 1064, 1065-66 (5th Cir. 1984) (*quoting White v. Murtha*, 377 F.2d 428, 431-32 (5th Cir. 1967)). The policy rationale behind law of the case doctrine is even more compelling in this case, where litigation has spanned the course of twelve years. "The law of the case doctrine applies not only to issues decided explicitly, but also to everything decided 'by necessary implication.'" *Felt*, 255 F.3d at 225 (*quoting Browning v. Navarro*, 887 F.2d 553, 556 (5th Cir. 1989)); *Quest Med., Inc.*, 90 F.3d at 1094 (same). Thus, where issues have been fully briefed and were "necessary predicates" to an appellate decision, law of the case applies whether the decision was made "tacitly or implicitly." *Felt*, 255 F.3d at 225.

II. Hourly Promotions.

The Court should award back pay for all three of the disputed periods – 1994-1995, 2003-2004, and 2005-2007. However, the rationale, and the required proceedings, differ to some extent for the different periods. For that reason, we treat them separately.

A. 1994-1995.

The Fifth Circuit affirmed Judge Cobb's determination that back pay must be awarded to the class for discrimination in promotions during the entire period 1994-2002, including the years 1994 and 1995. Lufkin specifically sought rehearing on that decision insofar as it included the years 1994 and 1995, on the grounds that the Fifth Circuit's holding that the McClain charge could not support the claims of promotion discrimination required the liability period (or scope of class covered by the remedies) to be reduced to that which was supported by the Thomas charge.[6] When the Fifth Circuit denied Lufkin's petition for rehearing, it sought review on

[6] Lufkin's Petition for Panel Rehearing filed March 20, 2008 argued, at pages 3-4: "Because the district court's findings were predicated on the erroneous conclusion that Lufkin was liable for acts back to March 6, 1994, remand for new fact finding is necessary and appropriate. . . . This Court should also remand this case for additional fact finding on the hourly promotions during the correct liability period."

certiorari by the Supreme Court, which also denied Lufkin's petition.[7] Because this issue has been raised three times in two appellate courts, and the original decision requiring back pay based on the number of promotions that Dr. Drogin found had been lost in 1994-1995 (as well as 1996-2002) for purposes of his liability analysis at trial has been upheld at every stage, Lufkin's argument is now foreclosed. A district court is not free to reverse a decision of the Court of Appeals in the same case, absent an intervening change of law under the general law of the case principles and authorities summarized in Section I.B. above. Yet such a reversal is essentially what Lufkin seeks here. Its argument should receive short shrift, as the Court indicated it was inclined to do at the telephonic status conference on April 6, 2009.[8]

In addition, even if the Court were to reconsider the matter, which it should not, there is good authority for extending the back pay period back two years prior the Thomas charge, which– as a practical matter, for reasons mentioned in footnote 1 above, all of – would include almost all of 1995. Section 706(g)(1) of Title VII, 42 U.S.C. §2000e-5(g)(1), provides that "Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission." This provision has been interpreted to require a back pay period of two years prior to the charge filing date, here February 26, 1995. *See*, *Estate of Pitre v. Western Elec. Co. Inc.*, 975 F.2d 700, 705-06 (10th Cir. 1992) (noting that 180-day charge filing

[7] The second question presented for review in Lufkin's Petition for Writ of Certiorari filed July 2, 2008 was:

> Whether the Fifth Circuit's decision imposing a liability period for a Title VII class claim beginning almost three years before the charge that the Court of Appeals found exhausted the administrative remedies for the class was filed conflicts with this Court's decisions negating liability for acts outside the Title VII limitations period.

Lufkin's argument on this issue started by stating: "The Court should also review the Fifth Circuit's clear misapplication of Title VII and established Supreme Court precedent in allowing liability to be determined *and back pay awarded* on promotion decisions not challenged in a timely charges" (emphasis added).

[8] In response to Lufkin counsel's argument that this Court should reconsider the 1994-1995 period's inclusion because "the Fifth Circuit simply did not understand the implication of using that number [127 hourly and 9 salaried promotions]," the Court cautioned the parties about the consequences, "if I was so bold as to write an opinion that the Fifth Circuit didn't understand something." (Tr. of April 7, 2009 Conf. at 35-36.)

period and the two year back pay limitations in the Title VII "serve different functions in the Title VII process," process, court held it was error not to award class back pay for entire two year period); *Goodwin v. Gen. Motors Corp.*, 273 F.3d 1005, 1011-1012 (10th Cir. 2002), *cert denied.* 537 U.S. 941 (2002).

B. 2003-2004.

This case was tried in December 2003 and October 2004. After post-trial submissions, Judge Cobb entered his original decision (Dkt. 461) on January 13, 2005. The record before him included evidence of practices at Lufkin through the time of trial, and nothing in the Amended Final Judgment (Dkt. 552) limits his findings of discrimination to any shorter or earlier time period. However, the statistical analyses placed in evidence by the parties at trial covered only the time period from March 6, 1994 to the end of 2002. The reason for this is that at the time of trial Lufkin had produced employee data only for March 6, 1994 through March 9, 2003, and in the interest of coherent full-year analyses, Dr. Drogin ended his analysis at year-end 2002. (*See*, Drogin Report at ¶¶ 7, 11-12, 43, 52-53.)

Neither Judge Cobb's findings of discrimination in promotions nor the Fifth Circuit's affirmance of those findings was based on statistical evidence alone. The Amended Final Judgment contains a lengthy recitation of non-statistical evidence on which Judge Cobb based his findings of promotion discrimination as a result of subjective decision-making, at pages 21-24, before it even mentions the statistical evidence in the case. The Fifth Circuit's decision specifically reviews those findings of discrimination and holds them not clearly erroneous. (Slip Op. at 13.) Thus, it is the law of this case that Lufkin practiced employment discrimination in promotions until at least the period through trial – as a practical matter, nearly to the end of 2004.

It is true that Dr. Drogin did not quantify the number of promotions lost by African American employees due to discrimination in promotions during the years 2003 and 2004; and for that reason, Judge Cobb's findings of discrimination continuing to the time of trial did not include a shortfall number for the last two years of that period. Dr. Drogin could not have done so, since Lufkin had not, at the time of trial, provided the data necessary to perform a statistical

analysis. There can be no question, however, that the discriminatory practices found by Judge Cobb to have continued would have continued to cause losses in promotions to African Americans. In fact, using additional data obtained by plaintiffs from Lufkin on remand, Dr. Drogin has (as Lufkin recognizes[9]) subsequently determined that there was an additional shortfall in African American promotions of some 33 positions in 2003 and 2004 Lufkin has not had a chance to examine these calculations on the record nor has the Court made findings on them; but at most, it is only the *number* of promotions lost by African Americans, not *whether* promotions were lost due to discrimination, that could be disputed.

The Court should therefore rule that the years 2003 and 2004 are to be included in the liability period, and class back pay is to be determined and awarded for those years. In keeping with the procedures followed by the parties and the court with respect to other disputed issues of monetary relief, plaintiffs suggest that the Court allow the parties an opportunity to narrow or resolve the disputed issues necessary to the determination of the amount of back pay before entering its judgment with respect to this time period.[10]

C. 2005-2007.

There is neither record evidence from trial nor judicial findings for the post-trial period. However, there is record evidence – which the Court has acknowledged in certain comments – showing that Lufkin has continued to discriminate in promotions since the trial; and the additional employee data obtained by plaintiffs in 2008, covering the period through the end of 2007, shows continuing promotional shortfalls for African Americans in hourly promotions.

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[9] *See*, Declaration of Dr. Baker, provided by defense counsel to plaintiffs' counsel on April 14, 2009, and to be filed with defendant's briefing of these issues, page 5, Table 1.

[10] While the lack of complete evidence for the post-2002 period raises the possible need for additional evidentiary proceedings, the cost of such proceedings – and cost is a consideration that the parties have kept squarely in mind in the current proceedings, resulting in a number of compromises on originally disputed issues that would have been expensive to litigate – is likely to motivate the parties to make serious attempts to stipulate to the relevant evidence, shortfall and/or damages numbers for the more recent periods.

Thus, in the absence of stipulations to the relevant evidence, additional proceedings are required, at a minimum, to entertain plaintiffs' claims with respect to this period.[11]

The limited post-remand discovery permitted by this Court reveals that, at least until plaintiffs specifically brought the issue to the Court's attention in the latter half of 2008, Lufkin made no significant changes in the practices that Judge Cobb found to have caused discrimination in promotions – not even those few and limited steps that defendant inaccurately represented to Judge Cobb it had made or was making in 2005. (*See*, Pls.' Resp. in Opp. to Def.'s Mot. to Quash filed Aug. 15, 2008 (Dkt. 583), at 5-7, fns 9 & 10 and exhibits referenced therein; Pls' Remedial Proposals filed Oct. 15, 2008 (Dkt. 586) at 3-4 and fns 6-10.) The Court is taking the current situation, and Lufkin's practices in recent years, into account in its entry of injunctive relief orders, as is proper. But backpay is an necessary and integral part of the remedy to which plaintiffs are entitled for the continuing discrimination practiced by Lufkin in those years. *Albemarle*, 422 U.S. at 417-18. The Court cannot, therefore, simply deny or dismiss plaintiffs' claims for back pay because the record is not complete. Instead, it must – unless the parties can resolve the issue once the Court holds that back pay will be awarded for this period – provide for appropriate further proceedings.

D. Plaintiffs' Response to Defendant's Anticipated Arguments Regarding Numbers of Lost Promotions.

Plaintiffs anticipate that defendant will base its argument as to the years 2003-2004 and 2005-2007 – and possibly as to 1994-1995 – at least in part on quibbles about the varying numbers of lost promotions identified by Dr. Drogin at different times for different purposes. Dr. Drogin determined the figure of 127 hourly positions (as well as that of 9 salaried positions) in 2003, using only the 1994-2002 information then available, by an analysis designed to test

[11] In an abundance of caution, plaintiffs do not seek monetary relief here for 2008 or the early months of 2009 since they have not reviewed any employee data and cannot therefore determine whether Lufkin's promotional practices continued to have adverse impact on African American employees during that period.

whether there were statistical disparities indicative of promotion discrimination at the liability phase of trial. He never, at that time or later, proposed that figure to be used in determining the proper measure of damages.[12] In fact, the analysis Dr. Drogin now deems appropriate for determination of damages based on the available data uses a slightly different method of calculations and produces slightly different results.

There is no requirement in the law that merits liability determinations and back pay or damages determinations be made using the same methods. In fact, the differing standards applicable to merits liability and damages stages of Title VII litigation provide a solid rationale for use of differing methods. At the liability stage, the burden of persuasion is on the plaintiff to show by a preponderance of the evidence that the defendant discriminated unlawfully; however, once discrimination has been established in a class action, the class members are entitled to a presumption in favor of relief, and in the case of monetary relief if the amount cannot be determined with exactitude, doubts should be resolved in favor of the plaintiff and approximations may be used. *Shipes*, 987 F.2d at 317-318. Thus, defendant's anticipated arguments that Dr. Drogin's 2003 liability calculations identify different overall promotional shortfall numbers than do his present damages calculations, mix apples and oranges rather than pointing up any true inconsistency.[13] In any further proceedings required by the Court to

[12] The method Dr. Drogin used to compute damages when Judge Cobb unexpectedly required plaintiffs to combine their liability and damages presentations at trial (plaintiffs had anticipated bifurcated proceedings, as is usual in Title VII class actions), was based on hourly wage differentials and projected those damages for 2003-2004 using 2002 wage differential figures. (Drogin Decl. dated October 27, 2003, Pls.'s Trial Ex. 2, ¶ 7.) Judge Cobb adopted that method in his Amended Final Judgment (Dkt. 552 at 33-34), erroneously as it turned out. Now that actual data is available for 2003-2004, it is possible to calculate the number of promotions lost by African Americans during those years, and Dr. Drogin has done so.

[13] These principles have particular application to one of the methodological issues initially disputed (but now resolved) by the parties: how to treat promotion comparisons of similarly situated African American and white employees when, for particular job-year pairings there is a "longfall" rather than a shortfall of African American promotions. For liability purposes, Dr. Drogin offset the longfall numbers against the shortfall numbers, resulting in a *net* figure of 127 lost hourly promotions. For damages purposes, however, Dr. Drogin simply does not figure in the "longfall" comparisons in his calculations, on the rationale that in particular instances where discrimination does not affect the promotional results it simply warrants not awarding any back pay for those instances, but does not warrant reducing the back pay attributable to other

determine the amount of back pay due for 2003-2004 and/or 2005-2007, Dr. Drogin will be able to testify or explain the small differences in his approach and the resulting differences in his shortfall numbers, and why they are fully appropriate.

III. Salaried Positions.

The category referred to by the parties as "salaried positions" includes promotions from hourly to salaried jobs, as well as promotions within salaried jobs. There is no dispute between the parties over the number of positions for which back pay is to be awarded if plaintiffs prevail on the issue as to inclusion of 1994-1995 in the liability period (9) or the amount of back pay. However, Lufkin is requesting the Court to revisit the question whether back pay is to be awarded for salaried positions at all.

If the 1994-1995 time period is excluded, Lufkin contends that there is no longer a statistically significant disparity in salaried promotions for the remainder of the period 1996-2002 alone, and therefore, no liability should be found or damages awarded. Plaintiffs submit that this argument is barred both by the law of the case doctrine, and other applicable principles of Title VII law.

A. Law of the Case.

All of the law of the case arguments set forth above with regard to hourly promotions in the 1994-1995 period apply with equal force to the issue of salaried promotions. Lufkin specifically sought rehearing by the Fifth Circuit as to salaried positions, based on its objection to the inclusion of 1994-95 in the liability period.[14] If the Court concludes that the issue cannot be reopened, it need go no farther in its analysis and must hold that defendant is liable for

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(continued …)
instances where adverse impact is found. (*See*, attached Drogin Decl. at ¶ 7.) This is the source of the difference in numbers he finds at the two different stages, and both are correct, for their separate purposes.

[14] Lufkin's petition for Panel Rehearing argued, at page 8: "There is no record evidence, and no finding by the district court, that the shortfall in salaried promotions was statistically significant . . . . Plaintiffs must prove that there was a statistically significant disparate effect after April 2, 1996. Thus, on the current record, Plaintiffs' case with respect to salaried promotion fails."

salaried promotions in 1994-2002. We note here only that the Fifth Circuit *specifically directed* that back pay be awarded for the 9 shortfall salaried positions. (Slip Op. at 20.)

B. Other Reasons to Award Back Pay for Salaried Promotions.

Even without inclusion of the shortfall for both 1994 and 1995, there remains an aggregate shortfall of African American promotions for 1996-2002. Although Lufkin contends that the statistical significance of the shortfall for 1995-2002 alone would be less than 2.00, it has never contended that all of the "lost promotions" occurred in 1994 or 1995, or that if one "took away" the 1994-1995 shortfalls, there would not be a shortfall for 1996-2002. In fact, there would be: Dr. Baker's recently exchanged Declaration indicates that the majority of the 1994-2002 shortfalls occurred after 1995. (Baker Decl., p. 5 Table 2.)

There is no bright-line rule requiring that statistical disparities resulting from promotion discrimination reach the level of statistical significance before they can be remedied. In fact, to apply such a limitation would frustrate Title VII's broad remedial purpose, *see* Section I.A above, and in cases like this one where the total number of promotions available for analysis is relatively small this would erect an unnecessary barrier to victims of discrimination who seek a monetary remedy. The Fifth Circuit's opinion also casts doubt on whether it was necessary or appropriate to apply any particular cutoff number of standard deviations to determine whether discrimination had occurred in salaried promotions. (*See,* Slip Op. at 18.)

In any event, Judge Cobb's findings of discrimination in promotions to salaried positions were not based on statistical evidence alone; on the contrary, he cited and credited testimony of plaintiff McClain and another witness at trial that they have been the victims of discrimination in salaried positions. (Am. Final J. at 23-24.) And the Fifth Circuit specifically upheld Judge Cobb's findings; it wrote: "The evidence also supported that Lufkin engaged in subjective decision making when awarding promotions in the salaried ranks. [After summarizing that evidence, the court held] "[i]n light of this evidence, we are not left with the definite and firm conviction that the district court erred in finding subjective decision making in Lufkin's

promotion system." (Slip Op. at 12-13.) Nothing in the Fifth Circuit's conclusion limits it to hourly promotions.

Finally, as stated above in section II.A, almost all of 1995 may be included in the back pay determination under the two-year rule of Section 706(d)(1) of Title VII. Application of that period would add to the shortfall number for 1996-2002, and increase the level of statistical significance of that number.

IV. Pre-Judgment Interest Rate Issues.[15]

A. The Annual Rate of Interest.

Judge Cobb awarded pre-judgment interest at a rate of 5% per year. (Am. Final J. at 34.) Defendant did not appeal the interest award to the Fifth Circuit. Accordingly, that decision is law of the case and cannot be reconsidered now. In addition to general law of the case principles set out above, specific case authority commands this result. In *Laffey v. Northwest Airlines, Inc.*, 740 F.2d 1071, 1102-03 (D.C. Cir. 1983), the D.C. Circuit rejected a challenge to a district court's award of prejudgment interest because it had not been initially appealed and any objection to it was therefore waived. "[A]lthough the [prior] judgment was ultimately declared non-final, [the appellate court] entertained [in the prior appeal] all objections to dispositive rulings that the parties placed before us …. The law of the case must be followed in all subsequent proceedings in the same case in the trial court or on a later appeal in the appellate court." *Id.* (internal citations omitted). *See also, Goodman v. Heublein, Inc.*, 682 F.2d 44, 45 (2nd Cir. 1982) (holding defendant waived challenge to prejudgment interest award by not challenging it at an earlier stage; "[T]his court recognized that Rule 59(e) generally applies to motions for prejudgment interest; otherwise, the finality and repose of judgments would be unduly undermined."); *Palmer v. Barry*, 794 F.Supp. 5 (D.D.C. 1991).[16]

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[15] The Amended Final Judgment awarded post-judgment interest at the statutorily required rate for the post-judgment period. (Am. Final J. at 38.) However, since the Amended Final Judgment was appealed and vacated, and has not been paid, the case remains in a pre-judgment posture for purposes of determining the interest rate.

[16] In two cases where a failure to award prejudgment interest was permitted to be raised

Moreover, Judge Cobb's choice of the applicable pre-judgment interest rate was correct, or at least within his discretion. Federal law does not prescribe a particular rate or reference scale for pre-judgment interest, and it permits resort to applicable state law in making that choice. *See*, *Quest Med. Inc. v. Aprill*, 90 F.3d at 1095 (affirming award of 10% prejudgment interest, compounded daily, after holding that "State law governs the award of prejudgment interest); *FSLIC v. Texas Real Estate Counselors, Inc.*, 955 F.2d 261, 270 (5th Cir. 1992)). That is what Judge Cobb did, in selecting the rate specified in Texas Finance Code § 304.003, supported by *Johnson and Higgins of Texas, Inc. v. Kenneco Energy, Inc.*, 962 S.W. 2d 507, 530-533 (Tex. 1988).[17]

Furthermore, the same rate of pre-judgment interest must be awarded until the date this Court's back pay judgment is entered. That will be the first *effective* judgment awarding back pay in the case, since the Fifth Circuit disapproved Judge Cobb's award.

B. Compounding of Interest.

Interest must also be compounded annually, as Judge Cobb ordered. (Am. Final J. at 34), and as this Court has suggested (Tr. of Dec. 5, 2008 Status Conf. at 8). In addition 28 U.S.C. §1961(b), specifying rates of post-judgment interest, provides that interest "shall be compounded

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(continued …)
belatedly, the purpose was to *allow* – not to reduce or deny – an award because allowing such interest was necessary to provide full relief and to comply with underlying (in those cases, New York state) law. *Newburger, Loeb & Co., Inc. v. Gross*, 611 F.2d 423, 433 (2nd Cir. 1979); *Adams v. Lindblad Travel, Inc.*, 730 F.2d 89, 93 (2nd Cir. 1984). In one case found by defense counsel, *In re Dept. of Energy Stripper Well Exemption Litigation*, 821 F.Supp. 1432 (D. Kan. 1993), a court allowed a party to raise the issue of the proper prejudgment interest rate in a subsequent appeal; however, that court allowed the issue only because the district court had applied a legally incorrect interest rate which the appellate court felt bound to correct. *Id.* at 1435-1436. In this case, as shown in the text, Judge Cobb committed no error in awarding 5% pre-judgment interest.

[17] *Kenneco* holds that the rate of post-judgment interest specified in Section 304.003 also governs pre-judgment interest awards under Texas law. A literal reading of *Kenneco* would support an award of prejudgment interest at the minimum statutory rate of 10% (simple interest); however, in keeping with plaintiffs' view that all prejudgment interest rate issues have been determined and are now settled as law of the case, plaintiffs hold to the position that 5% interest, compounded annually, must be awarded.

annually." While not applicable by its terms to prejudgment interest, this provision confirms that the usual and default method of calculating interest on a judgment is to compound the amount on an annual basis.

CONCLUSION

The Court should rule that class back pay is to be awarded for the period 1994-2007. It should permit the parties to submit further agreements or proposals either jointly proposing the amount and terms of a judgment to be entered herein, or suggesting efficient methods of proceeding to determine any remaining disputed issues. Unless the parties agree to resolve all issues, the further proceedings will include quantification of damages for the 2003-2004 period, and quantification of both lost promotions and damages from such lost promotions for the 2005-2007 period. The Court should, in addition, order that any judgment shall include pre-judgment interest at a rate of 5%, compounded annually.

Dated: April 17, 2009

Respectfully submitted,

By: /S/ Teresa Demchak

Teresa Demchak, CA Bar No. 123989
tdemchak@gdblegal.com
Morris J. Baller, CA Bar No. 048928
mballer@gdblegal.com
Goldstein, Demchak, Baller, Borgen & Dardarian
300 Lakeside Drive, Suite 1000
Oakland, CA 94612-3534
(510) 763-9800

Timothy Garrigan, TX Bar No. 07703600
tim@sgclaw.org
Stuckey, Garrigan & Castetter Law Offices
2803 North Street
Nacogdoches, TX 75963-1902
(936) 560-6020

Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that I have served all counsel of record in this case, including the following, with a true and correct copy of the foregoing and attachment thereto by sending same via electronic filing to:

Douglas Hamel
Christopher V. Bacon
Vinson & Elkins
2806 First City Tower
1001 Fannin Street
Houston, TX 77002-6760

on this 17th day of April, 2009.

/S/ Teresa Demchak
Teresa Demchak