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)

PLAINTIFFS' OPPOSITION TO DEFENDANT LUFKIN INDUSTRIES, INC.'S AMENDED MOTION FOR PARTIAL SUMMARY JUDGMENT

Defendant Lufkin's Amended Motion for Partial Summary Judgment ("MPSJ") (Dkt. 632), seeks dismissal of Plaintiffs' salaried promotion claim, a claim already adjudicated on the merits in Plaintiffs' favor by this Court in a decision affirmed by the Fifth Circuit.

Lufkin contends that because the Fifth Circuit found that the 1997 EEOC charge of named plaintiff Buford Thomas was the operative charge to support Plaintiffs' class promotion claim, the Fifth Circuit should have – but erroneously did not – exclude promotions made in 1994-95 in addressing the remaining liability and remedy questions on appeal. Lufkin further argues that if 1994-95 salaried promotions are excluded from the statistical analysis there is no statistically significant disparity in salaried promotions for 1996-2002, the remainder of the period covered by statistical evidence in the trial record, and, therefore, Judge Cobb's liability finding of salaried promotion discrimination, the Fifth Circuit's affirmance of that finding and any remedies predicated on it cannot stand. Accordingly, Lufkin argues that it should be granted summary judgment on Plaintiffs' salaried promotion claim as a matter of law.

Lufkin's motion ignores the law of this case, the evidentiary and legal findings of this Court and the Fifth Circuit, and Title VII's broad remedial purposes, and misinterprets the evidence before the Court and applicable case law.[1] The Court should deny the MPSJ.

A. Statement of Relevant Facts and Rulings in the Case

Judge Cobb found that Lufkin committed actionable classwide discrimination in both initial assignments and promotions.[2] Judge Cobb found that a single practice – Lufkin's subjective decision making – adversely impacted African American employees in initial assignments and promotions to *both* hourly and salaried positions in violation of Title VII.[3]

[1] The parties' respective reports regarding back pay demonstrate that among the disputed issues are whether law of the case requires the Court to consider the 1994-95 time period and whether the Court should apply Title VII's two year statute of limitations in calculating back pay. *See* Pls.' Br. on Disputed Class Back Pay Issues (Dkt. 629); Def. Lufkin's Am. Position on Disputed Issues for Calculation of Monetary Relief (Dkt. 633). Resolution of these issues will affect the amount of the back pay remedy, but not whether there will be injunctive remedies regarding *hourly* promotion practices; Lufkin concedes this. Rather, Lufkin argues there should be no injunctive relief as to salaried promotion practices.

[2] Amended Final Judgment ("Am. Final J.") (Dkt. 552) at 19-30.

[3] *Id.* at 5-6, 19-24.

Lufkin appealed Judge Cobb's liability determinations. Lufkin successfully argued to the Fifth Circuit that no relief could be awarded based on Plaintiffs' initial assignment claim because no timely filed charge of discrimination raised the initial assignment issue on an adverse impact theory.[4] The Fifth Circuit found that named plaintiff Buford Thomas' charge of discrimination sufficiently exhausted Plaintiffs' claim of "a discriminatory, albeit neutral, company policy authorizing subjective promotion decisions."[5] The Fifth Circuit affirmed Judge Cobb's findings of classwide hourly and salaried promotion discrimination and his determination that Lufkin must be held liable for damages for such discrimination.[6]

Plaintiffs successfully argued to the Fifth Circuit that the injunction Judge Cobb had entered lacked specificity, failed to remedy the discriminatory exercise of subjective decision making, and included no provision to ensure Lufkin's compliance. The Fifth Circuit held that the "court's injunction lacks the detail required under Federal Rule of Civil Procedure 65(d)," and remanded to this Court the task of crafting an injunction "balancing plaintiffs' requests for stronger measures to ensure Lufkin's compliance with the imprecision of the liability finding."[7]

Lufkin petitioned for rehearing of the panel decision, specifically raising the issue that, because the panel had found McClain's 1995 EEOC charge did not support the class claims, and the class promotion claim could only be properly founded on Thomas' 1997 charge, it was erroneous to uphold liability and grant relief for the years 1994-95, which are outside the 300 day period prior to the filing of Thomas' charge. The Fifth Circuit denied Lufkin's petition. Lufkin then petitioned for a writ of certiorari raising that same issue to the United States Supreme Court. The Supreme Court denied Lufkin's petition. The present remand followed.

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[4] *McClain, et al. v. Lufkin Indus., Inc.*, 519 F.3d 264 (5th Cir. 2008), Slip Op. filed in this Court as Dkt. 579, at 4-9.

[5] *Id.* at 8-9.

[6] *Id.* at 10-18.

[7] *Id.* at 24.

B. Legal Standards

Summary judgment is appropriate if the record discloses "that there is no genuine issue as to any material fact and that the movant is entitled to a judgment as a matter of law."[8] The pleadings, depositions, admissions, and answers to interrogatories, together with affidavits, must demonstrate that no genuine issue of material fact remains.[9] When considering a motion for summary judgment, the district court "must 'review the facts drawing all inferences most favorable to the party opposing the motion.'"[10]

A court must find a "[a] factual dispute . . . [to be] 'genuine' if the evidence is such that a reasonable jury could return a verdict for the nonmoving party . . . [and a] fact . . . [to be] 'material' if it might affect the outcome of the suit under the governing substantive law."[11] In other words, a factual dispute is genuine if it requires a trial to resolve competing reasonable factual contentions.[12] Judgment as a matter of law is permitted only if the facts and law will reasonably support only one conclusion.[13]

C. Argument

1. The Law of the Case Doctrine and Mandate Rule Bar Lufkin's Position as to Injunctive Relief, as Well as Back Pay.

The Fifth Circuit specifically directed that back pay be awarded for the 9 shortfall salaried promotions.[14] The necessary implication of the Fifth Circuit's remand for back pay

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[8] Fed. R. Civ. P. 56(c).

[9] *See id.; Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *Amoco Prod. Co. v. Horwell Energy, Inc.*, 969 F.2d 146, 148 (5th Cir. 1992).

[10] *Amoco*, 969 F.2d at 148, *quoting Reid v. State Farm Mut. Auto Ins. Co.*, 784 F.2d 577, 578 (5th Cir. 1986); *Hertz v. Treasure Chest Casino, L.L.C.*, 274 F. Supp. 2d 795, 798 (E.D. La. 2003).

[11] *Hertz*, 274 F. Supp. 2d at 798, *quoting Beck v. Somerset Techs., Inc.*, 882 F.2d 993, 996 (5th Cir. 1989).

[12] *See* James Wm. Moore, *Moore's Federal Practice* § 56.11[3] (3d ed. 2003) ("*Moore's Federal Practice*"); *Amoco*, 969 F.2d at 148.

[13] *See Bricklayers, Masons and Plasterers Int'l Union of Am., Local Union No. 15 v. Stuart Plastering Co., Inc.*, 512 F.2d 1017, 1024 (5th Cir. 1975); *Moore's Federal Practice* §56.11[3]; *Amoco*, 969 F.2d at 148, *quoting Reid*, 784 F.2d at 578; *Hertz*, 274 F. Supp. 2d at 798.

[14] Slip Op. at 20.

based on the number of lost promotions in 1994-2002, is that 1994-2002 statistical evidence must be used in determining adverse impact.[15] Lufkin's argument that 1994-95 salaried promotions must be excluded from the adverse impact analysis is barred by the law of this case and the mandate rule.[16]

Lufkin, however, contends that the law of the case doctrine does not preclude this Court from granting its motion because the Fifth Circuit did not explicitly address the issues presented by the MPSJ.[17] Lufkin argues that it "did not challenge Thomas' charge" on appeal and "had no reason to anticipate that the Court of Appeals would rely on Thomas' charge, and, therefore, Lufkin did not address the limitations period that would apply if Thomas' charge was the operative charge in its original briefing."[18] In fact, Lufkin challenged Thomas' charge in its opening brief in the Fifth Circuit where, while conceding that the charge "does support an alleged class-wide denial of promotions," it argued that because "Plaintiffs … offered *no evidence of disparate impact* against blacks *in the time period associated with Thomas' charge* … even if Thomas' charge would support the class promotion claim, *it fails for want of proof*."[19]

In their reply brief in the Fifth Circuit, Plaintiffs argued that "[t]he other charge that supports Plaintiffs' class claims" is Thomas' charge, and that "Lufkin … concedes [Thomas' charge] alleges Class Claims."[20] In its reply brief, Lufkin did not mention Thomas' charge nor respond – as it could have – to Plaintiffs' argument that the charge supported the class claims.

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[15] *See* Pls.' Br. on Disputed Class Back Pay Issues (Dkt. 629) at 5-7.

[16] "The mandate rule compels compliance on remand with the dictates of the superior court and forecloses relitigation of issues expressly or impliedly decided by the appellate court." *Fuhrman v. Dretke,* 442 F.3d 893, 897 (5th Cir. 2006). The mandate rule provides that a lower court " 'implement both the letter and the spirit of the [appellate court's] mandate,' and may not disregard the 'explicit directive' of that court." *United States v. Becerra*, 155 F.3d 740, 753 (5th Cir. 1998), (citing *Johnson v. Uncle Ben's, Inc.*, 965 F.2d 1363, 1370 (5th Cir. 1992)).

[17] MPSJ at 5.

[18] *Id*.

[19] Br. of Appellee-Cross Appellant Lufkin Industries, Inc. at 23 n. 8 (emphasis added).

[20] Resp. and Reply of Plaintiffs-Appellants and Cross Appellees at 4, n. 5.

Lufkin's assertion that it could not have anticipated the Fifth Circuit "would rely on Thomas' charge" is not supported by the record since both parties addressed the sufficiency of that charge in their original briefs in the Fifth Circuit, and Plaintiffs affirmatively argued in the Fifth Circuit that Thomas' charge "support[ed] the class claims,"[21] to which Lufkin failed to respond. Therefore, Lufkin waived its argument that a different "limitations period … would apply if Thomas' charge was the operative charge" by not raising it on appeal[22]; it should not be able to raise it in this Court on remand.

Alternatively, Lufkin did argue in the Fifth Circuit that based on a lack of "evidence of disparate impact against blacks in the time period associated with Thomas' charge," the charge "fails for want of proof." It must be assumed that the Fifth Circuit considered and rejected this argument, either explicitly or by necessary implication, when it: (1) found Thomas' charge satisfied the exhaustion requirement for Plaintiffs' class promotion claim; and (2) affirmed Judge Cobb's findings of classwide hourly and salaried promotion discrimination and with regard to the total number of hourly and salaried promotions lost to the class.[23]

Lufkin cites *Alpha/Omega*, as supporting its argument that despite the Fifth Circuit's ruling, law of the case does not apply and this Court is free to decide "issues stemming from the finding on exhaustion that affect the promotion claims, with regard to both liability and damages."[24] *Alpha/Omega* does not support Lufkin's position. In *Alpha/Omega*, the issue decided on the first appeal was not the same as, nor reasonably encompassed in, the issue that had to be addressed by the district court on remand. On the first appeal, the issue had to do with

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[21] The Fifth Circuit also found that "Lufkin did not contend otherwise at trial." Slip Op. at 9.

[22] *See Carlisle Ventures, Inc. v. Banco Espanol de Credito, S.A.*, 176 F.3d 601, 609 (2d Cir. 1999) (holding appellant waived argument where its reply brief failed to respond to appellee's contrary assertions and did not otherwise point to any evidence disputing those assertions).

[23] *See Alpha/Omega Ins. Servs., Inc. v. Prudential Ins. Co. of Am.*, 272 F.3d 276, 279 (5th Cir. 2001) (law of the case doctrine is limited to issues decided, either explicitly or by necessary implication, in the earlier litigation).

[24] MPSJ at 6.

whether there were disputed issues of material fact sufficient to require denial of the defendant's motion for summary judgment.[25] On remand, the issue – one distinct from the question resolved in the earlier appeal – was whether as a matter of law the disputed issue was material to the plaintiff's claim.[26] In this case, the Fifth Circuit explicitly addressed and ruled on the issue of how many lost promotions were at issue, and its ruling necessarily implicated the 1994-95 time period statistics. The Fifth Circuit also rejected by necessary implication Lufkin's argument that there was insufficient "evidence of disparate impact against blacks in the time period associated with Thomas' charge" to prove the class promotion allegations when it affirmed Judge Cobb's hourly and salaried promotion discrimination liability finding. Lufkin should not be permitted to continue to litigate questions it has presented to, and lost in, this Court and the Fifth Circuit. The Court should deny Lufkin's motion.

2. Even When 1994-95 Salaried Promotions are Excluded, the Statistical Patterns, Coupled With Other Evidentiary Findings Made by Judge Cobb and Affirmed by the Fifth Circuit, Support an Inference of Discrimination.

The "salaried promotions" analyzed by the parties' respective statistical experts include promotions of hourly employees to (first line) supervisor positions as well as promotions of employees in one salaried position to another salaried position. The former category of promotions involve the *same* pool of potential promotees as the hourly promotion claim and the *same* decision makers responsible for promotions of hourly employees to hourly positions.

Lufkin's statistical expert, Dr. Baker, reviewed the analyses of Plaintiffs' expert Dr. Drogin with regard to salaried promotions for various time periods and also separately for promotions from hourly to salaried jobs and from one salaried job to another.[27] For the period 1996-2002 –that is, excluding 1994-95 promotions, which Lufkin contends should not be included based on the timing of the filing of Thomas' charge – Dr. Baker found that blacks

[25] 272 F.3d at 279-80.

[26] *Id.* at 280-81.

[27] *See* Second Declaration of Mary Baker, Ph.D. ("Baker Second Decl."), Exh. C to MPSJ. The MPSJ fails to refer to this much closer analysis by Lufkin's own expert.

received 6.14 fewer promotions from hourly to salaried jobs for a disparity of -1.95 standard deviations.[28] This is only -.01 standard deviation less than the -1.96 standard deviation Dr. Baker found for hourly to salaried job promotions for 1994-2002.[29] As Dr Baker concedes, "the threshold of statistical significance [is] -1.96 standard deviations."[30] The difference between -1.95 and -1.96 standard deviations is de minimus, *i.e.*, a 1 in 19.5 probability of random occurrence versus 1 in 20, at the -1.96 level.[31] Accordingly, even adopting Lufkin's erroneous contention that the Court should not consider 1994-95 salaried promotions and its unsupported claim that statistically significant disparities are a prerequisite to remedies, *see* below at 8-9, 11-13, there is a basis in such disparities in hourly to salaried promotions for 1996-2002.

The finding of a disparity in 1996-2002 hourly to salaried promotions that lies at the borderline of statistical significance is echoed in other disparities for other relevant time periods that suggest the presence of a causal factor – *i.e.*, discrimination – while falling just short of the conventional level for statistical significance. Dr. Baker found that between 1996-2004, blacks received 5.74 fewer promotions from hourly to salaried jobs for a disparity of -1.70 standard deviations; between 1996-2007, blacks received 4.73 fewer promotions from hourly to salaried jobs for a disparity of -1.24 standard deviations.[32] Dr. Baker also found adverse impact in all salaried promotions for 1996-2002, in that blacks received 6.35 fewer promotions from hourly to salaried jobs and within salaried jobs for a disparity of -1.62 standard deviations.[33] Such a disparity has a 1 in 9 times' probability of random occurrence.[34]

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[28] *Id.* (Table 2).

[29] *Id.* (Table 2).

[30] *Id.* at ¶ 8.

[31] Declaration of Richard Drogin, Ph.D. ("Drogin Decl."), attached as Exh. 1 hereto, at ¶ 6.

[32] Baker Second Decl. (Table 2).

[33] *Id.* (Table 1). Dr. Baker found that between 1996-2004, blacks received 6.45 fewer promotions from hourly to salaried jobs and within salaried jobs for a disparity of -1.56 standard deviations; between 1996-2007, blacks received 5.44 fewer promotions from hourly to salaried jobs and within salaried jobs for a disparity of -1.21 standard deviations. *Id.*

[34] Drogin Decl. ¶ 6.

a. Lufkin Ignores Judge Cobb's Legal Analysis and Evidentiary Findings and the Fifth Circuit's Affirmance of the Analysis and Findings.

Lufkin argues that because the 1996-2002 salaried promotion disparities are barely lower than -1.96 standard deviations, they are not "statistically significant" and cannot support a finding of liability under the adverse impact theory of discrimination or the imposition of remedies. Although Lufkin asserts, without citation to judicial authority, that "[d]isparities of less than two-standard deviations . . . cannot establish the requisite causation for disparate impact,"[35] "the 5% level is an arbitrary convention. It has never been a part of professional standards to insist on a specific level of confidence . . ."[36] The 5% level "does not mean that only results significant at the 5% level should be considered; less significant results may be suggestive."[37] This is particularly the case where, as here, the amount by which the disparity falls short of the conventional threshold is minimal and there is a consistent pattern of shortfalls in related measures of disparity.

Furthermore, Judge Cobb's factual and legal findings, which were affirmed by the Fifth Circuit, expressly refute Lufkin's contention. Judge Cobb, in articulating the legal standards "[s]upporting a claim of disparate impact with statistical evidence," noted that "most courts have rejected the arbitrary application of a 5% threshold."[38] He further observed that "'[w]hether a given [test result] should be regarded as statistically significant must be determined on a case by case basis since the value signifying statistical significance is dependent on sample size.'"[39]

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[35] MPSJ at 4.

[36] *United States v. Georgia Power Co.*, 474 F.2d 906, 915 n.11 (5th Cir. 1973).

[37] *Vuyanich v. Republic Nat'l Bank of Dallas*, 505 F. Supp. 224, 272 (N.D. Tex. 1980), *vacated on other grounds*, 723 F.2d 1195 (5th Cir. 1984).

[38] Am. Final J. (Dkt. 552) at 14, *citing Thomas v. Deloitte Consulting LP*, No. 3-02-CV-0343-M, 2004 WL 1960097, at *5 (N.D. Tex. 2004) ("The Fifth Circuit has never adopted a 'bright line' test for statistical significance."); *Rendon v. AT & T Technologies,* 883 F.2d 388, 397-98 (5th Cir. 1989) (rejecting argument that there is a strict legal benchmark requiring a particular number of standard deviations to demonstrate that data has statistical significance).

[39] Am. Final J. (Dkt. 552) at 14, *quoting Overton v. City of Austin,* 871 F.2d 529, 544 (5th Cir. 1989) (Jones, J., concurring).

Notably, Judge Cobb recognized that "[e]ven statistical disparities falling just short of the traditional standard of 2 (or 1.96) standard deviations may sometimes be meaningful, since consistent shortfalls in every category are probative of a pattern of discrimination, *especially when other evidence confirms allegations of discrimination*."[40] In finding that the shortfall of 8.85 salaried promotions [for 1994-2002] was "significant at the .05 level," Judge Cobb observed that "[t]he statistical significance is not as robust [as for hourly promotions], but that is in part an artifact of the smaller sample size."[41]

On appeal, Lufkin argued that the salaried promotion disparity was insufficient to support the Court's liability finding. The Fifth Circuit, in affirming Judge Cobb's "finding of a statistically significant disparate impact in promotions," noted that "[t]his court has rejected the contention that a disparity of two or three standard deviations is categorically insufficient to support an inference of adverse impact. And Lufkin has not persuasively explained why a standard deviation of this magnitude should be accorded reduced significance under the particular circumstances of this case."[42] Consistent with Judge Cobb's rationale, affirmed by the Fifth Circuit, authoritative commentators also warn against automatic application of two standard deviations as a rigid cut-off, as urged by Lufkin: "A disparity that is not statistically significant at the .05 level can look highly significant when combined with appropriate anecdotal and/or comparative evidence of discrimination."[43]

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[40] Am. Final J. (Dkt. 552) at 15, *citing, E.E.O.C. v. Am. Nat'l Bank*, 652 F.2d 1176, 1192 (4th Cir. 1981), *cert. denied*, 459 U.S. 923 (1982) (emphasis added).

[41] Am. Final J. (Dkt. 552) at 29.

[42] Slip Op. at 18. Since both Judge Cobb and the Fifth Circuit rejected the contention that Lufkin now raises in regard to the statistical significance of salaried promotion disparities, the law of the case doctrine also requires this Court to reject Lufkin's contention.

[43] *See* Paetzold, R. and S. Willborn, *The Statistics of Discrimination*, Sec. 4.13, Ch. 4, p. 41 (Thomson/West 2006).

b. The 1996-2002 Statistical Data Show Adverse Impact.

The 1996-2002 statistical data for salaried promotions *do* show adverse impact at levels not far below that of statistical significance. The -1.62 standard deviation in all salaried promotions for 1996-2002 has a 1 in 9 probability of random occurrence. The hourly to salaried promotion disparity is -1.95 standard deviations, imperceptibly short of the undisputed threshold of statistical significance, with a 1 in 19.5 probability of random occurrence.

Moreover, although Lufkin claims that "promotions outside of the relevant time period are not relevant,"[44] *Hazelwood*, Lufkin's principle supporting case, states the exact opposition.[45] The other cases cited by Lufkin do not overrule the Supreme Court's holding in *Hazelwood*. In *National Railroad Passenger Corp. v. Morgan*, which Lufkin cites, the Supreme Court eliminated the continuing violation doctrine for "discrete discriminatory acts," including termination, failure to promote, denial of transfer, or refusal to hire.[46] However, the Court expressly acknowledged that pre-liability period evidence still may reach the jury as "background evidence in support of a timely claim."[47] Thus, even accepting Lufkin's argument that 1994-95 promotions cannot be used in determining adverse impact, the Court is free to consider evidence of Lufkin's 1994-95 salaried promotion practices as background evidence in determining whether post-1995 evidence supports an inference of discrimination, particularly because Lufkin's practices were unchanged throughout 1994-2002 (or through the present time).

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[44] MPSJ at 4-5.

[45] *See Hazelwood Sch. Dist. v. United States*, 433 U.S. 299, 310 n.15 (1977) ("Proof that an employer engaged in racial discrimination prior to the effective date of Title VII might in some circumstances support the inference that such discrimination continued, particularly where relevant aspects of the decision making process had undergone little change."); *see also Valentino v. U.S. Postal Serv.*, 674 F.2d 56, 71 n.26 (D.C. Cir. 1982) ("[C]ategorical rejection of" statistics that "fail[] to factor out time-barred discrimination" "is not warranted."); *Williams v. Anderson*, 562 F.2d 1081, 1087 n.7 (8th Cir. 1977) ("Proof that the defendants engaged in racially discriminatory practices and policies prior to the period of time for which relief is available under the statute of limitations is relevant since it creates the inference that the discrimination continued, particularly when there has been little change in the decision making process."); *Morton v. GTE N. Inc.*, 922 F. Supp. 1169, 1176-77 (N.D. Tex 1996) (same).

[46] 536 U.S. 101, 102 (2002).

[47] *Id.*

It is also significant that the patterns of disparities for 1996-2002, 1996-2004 and 1996-2007 all show consistent negative shortfalls raising an inference of discrimination.[48] Judge Cobb recognized that "consistent shortfalls in every category [even if falling short of the traditional standard of 2 (or 1.96)] are probative of a pattern of discrimination, especially when other evidence confirms allegations of discrimination."[49]

c. Judge Cobb Found That Other Evidence Confirmed Plaintiffs' Allegations of Discrimination in Salaried Promotions.

There is no absolute requirement that Plaintiffs show a statistically significant disparity as a prerequisite to a finding of liability and an order for injunctive relief. Where other evidence and findings of promotion discrimination confirm the inference established by statistical evidence, it is proper to draw that inference from disparities that approach but do not reach the threshold of statistical significance. For instance, in *Segar v. Smith*, the D.C. Circuit affirmed the district court's Title VII liability finding despite the fact that "plaintiffs' statistical evidence of discrimination at [the upper] level had not achieved acceptable levels of statistical significance."[50] The liability finding was upheld because "enough other probative evidence exist[ed] to permit an inference of discrimination in promotions [in upper] level" positions.[51] Plaintiffs had succeeded in showing that the defendant engaged in "discrimination in initial grade assignments, work assignments, supervisory evaluations, and discipline," "the factors that determine a special agent's prospects for discretionary promotions at the higher levels."[52] The D.C. Circuit held that "[a]fter finding discrimination in the factors that bear most strongly on

[48] Baker Second Decl. (Tables 2 and 3). The disparities in salaried to salaried promotions only are much smaller, *see* Baker Second Decl. (Table 3), because there are so few African Americans in management positions that the pool and expected promotion percentages are very low.

[49] Am. Final J. (Dkt. 552) at 15.

[50] 738 F.2d 1249, 1264 (D.C. Cir. 1984).

[51] *Id.* at 1283.

[52] *Id.*

promotions, and in promotions at the immediately preceding step, the trial court could and did appropriately draw an inference of discrimination in [upper level] promotions."[53]

In this case, Judge Cobb correctly noted that "[a]necdotal evidence of discrimination against individuals brings the cold statistics to life and may buttress the showing of class wide discriminatory practices."[54] He further recognized that "[d]espite the necessary primacy of statistical evidence, proof of intent remains relevant to a claim of disparate impact employment discrimination. Evidence of discriminatory intent can buttress and bolster statistical data, while also serving to rebut a defense of business necessity."[55]

Judge Cobb found, and the Fifth Circuit affirmed, discriminatory practices based on evidence separate from the statistical evidence. Specifically, Judge Cobb found that Lufkin maintained a subjective decision making system for *all* promotions – hourly and salaried – that was manipulated and used to discriminate in contravention of supposedly objective rules and Collective Bargaining Agreement provisions governing promotions.[56] He also found that blacks were discouraged from applying for promotions and denied equal training opportunities.[57]

Plaintiffs supported their statistical evidence with anecdotal testimony, including testimony relating to salaried promotions, by plaintiff McClain and class members Florine Thompson and Vivian Crain.[58] Judge Cobb credited that testimony.[59] That non-statistical

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[53] *Id.* at 1283-84.

[54] Am. Final J. (Dkt. 552) at 14, *citing U.S. v. Int'l Bhd. of Teamsters*, 431 U.S. 324, 339 (1977).

[55] Am. Final J. (Dkt. 552) at 16. Moreover, "anecdotal evidence might . . . reduce the need for strong statistical proof." *Segar*, 738 F.2d at 1278. "[T]he combination of convincing anecdotal and statistical evidence is potent." *Coral Construction Co. v. King County*, 941 F.2d 910, 919 (9th Cir. 1991).

[56] Am. Final J. (Dkt. 552) at 5-7, 21-24.

[57] Am. Final J. (Dkt. 552) at 21-24 and n. 6.

[58] McClain and Thompson testified about difficulties they had in getting promoted to salaried positions; Crain testified about racially derogatory comments and slurs she heard made by Lufkin HR Representative Viron Barbay, who has responsibilities affecting salaried promotions. Trial Transcript Day 7 at 131:18-132:20; *see also* Transcript of Deposition of Lufkin's HR Manager John Havard (Barbay is one of several HR employees responsible for documenting the reasons for selection of employees for promotion to salaried jobs). John Havard Depo. Tr., July 9, 2008 at 181:1-182:22, attached as Exh. 1 to Declaration of Scott Grimes.

[59] Am. Final J. (Dkt. 552) at 20, 23.

evidence provided additional grounds for both Judge Cobb and the Fifth Circuit to find discrimination in salaried promotions.

d. The Combined Data for Hourly and Salaried Promotions – Measuring the Combined Effects of the Same Practice – Show Statistically Significant Adverse Impact.

Judge Cobb observed that the less robust statistical significance found for salaried promotions was "in part an artifact of the smaller sample size,"[60] not because of the non-existence of discrimination. Plaintiffs' expert Dr. Drogin, using the same methodology he used in analyzing the data for the results he presented at trial, has combined the data for hourly and salaried promotions for the various time periods analyzed by Dr. Baker. Dr. Drogin found that between 1996-2002, blacks received 96.2 fewer hourly and salaried promotions than expected for a disparity of -6.34 standard deviations; between 1996-2004, blacks received 128.72 fewer hourly and salaried promotions than expected for a disparity of -7.78 standard deviations; and between 1996-2007, blacks received 152.34 fewer hourly and salaried promotions than expected for a disparity of -8.27 standard deviations.[61] Dr. Drogin concludes that these disparities "show a high degree of statistical significance. For example, for the period of 1996-2002 the Z-value of -6.34 would occur *less than once in 100 million times by random fluctuation*. The larger (negative) Z-values for 1996-2004 and 1996-2007 are *even less likely to occur by random fluctuation*."[62] Since the mechanism of discrimination – subjective decision making – was the same for hourly and salaried promotions, these combined disparities further support the need for injunctive relief to address Lufkin's salaried as well as hourly promotion practices.

[60] Am. Final J. (Dkt. 552) at 29.
[61] Drogin Decl. at ¶ 4, Table 1.
[62] *Id.* at ¶ 5 (emphasis added).

3. Injunctive Relief is Properly Founded on This Court's and the Fifth Circuit's Findings if Discrimination Even if Thomas' Charge Establishes a Shorter Liability Period.

In fashioning an appropriate remedy for employment discrimination, Congress has granted courts plenary equitable power under Title VII.[63] Section 706 (g) of Title VII, 42 U.S.C. § 2000e-5(g), expressly authorizes both injunctive and affirmative relief.[64] Comprehensive injunctive relief is required here because the same discriminatory practice was found to infect salaried promotions as hourly promotions. Accordingly, an injunction should be entered requiring Lufkin to change that system in all of its uses. It would be anomalous to grant back pay (as the Court must, under the law of the case doctrine and the mandate rule) but not injunctive relief, for salaried positions: to do so would contravene the requirement that "[w]here racial discrimination is concerned the [district] court has not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future."[65]

D. Conclusion

Lufkin's motion and requested relief are barred by the law of this case and the mandate rule. Alternatively, Lufkin bears the burden of establishing that there are no genuine issues of material fact and that it is entitled to judgment as a matter of law. While Lufkin attempts to argue the evidence, it fails entirely to demonstrate that there is no genuine dispute. On the contrary, both the facts and law require the disputed measures of relief. Plaintiffs respectfully request that the Court deny Lufkin's MPSJ.

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[63] *See Franks v. Bowman Transp. Co.*, 424 U.S. 747, 770 (1976).

[64] *See also, Franks*, 424 U.S. at 785-786 (in order to foster equal employment opportunities, Congress gave the lower courts broad power under §706(g) to fashion "the most complete relief possible" to remedy past discrimination); *Local 28 of Sheet Metal Workers' Int'l Ass'n v. E.E.O.C.*, 478 U.S. 421, 446 (1986) (Congress intended to vest district courts with broad discretion to award appropriate equitable relief to remedy unlawful discrimination).

[65] *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 418 (1975); quoting *Louisiana v. United States*, 380 U.S. 145, 154 (1965).

Dated: May 1, 2009

Respectfully submitted,

By: /S/

Teresa Demchak, CA Bar No. 123989
tdemchak@gdblegal.com
Morris J. Baller, CA Bar No. 048928
mballer@gdblegal.com
Lin Chan, CA Bar No. 255027
lchan@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
Tim2@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 and all exhibits and attachments thereto, with a true and correct copy of the foregoing 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 1st day of May, 2009.

/S/
Teresa Demchak