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 (COBB)

PLAINTIFFS' OPPOSITION TO MOTION OF DEFENDANT LUFKIN INDUSTRIES, INC., TO VACATE THE COURT'S JANUARY 18, 2005 ORDER DIRECTING FURTHER PROCEEDINGS REGARDING INJUNCTIVE RELIEF

INTRODUCTION

Defendant Lufkin Industries, Inc.'s ("Lufkin") Motion to Vacate the Court's Order of January 18, 2005 and Response to Plaintiffs' Motion for Order Requiring Further Proceedings ("Motion to Vacate") is a grab-bag of procedural complaints, attacks on the Court's authority to issue orders in furtherance of its duty to eradicate Lufkin's pervasive and long-standing discriminatory practices found in the Memorandum and Order entered January 13, 2005 ("Mem. & Order"), refusals to acknowledge the need and propriety of a remedy for found discrimination, excuses for Lufkin's stubborn insistence on delaying the arrival of effective justice in the form of specific injunctive relief for the Class, unfounded accusations that the Court is improperly delegating its duties to Plaintiffs' attorneys, and ad-hominem attacks on the motives and actions of Class Counsel in pursuing an effective remedy on behalf of the Class. Baseless in substance and intemperate in its charges of improprieties on all sides (excepting its own side), Lufkin's Motion to Vacate should be rejected in its entirety.

Instead, the Court should continue on the course it set in the Memorandum and Order and the January 18, 2005 Order. The Court has found, and based on the evidence at trial was "convinced," that Lufkin discriminated broadly against the Class in its initial assignment and promotion practices (as to both hourly and salaried positions), and as a result Class members lost compensation. Mem. & Order at 37. In its initial opinion, the Court initially suggested additional proceedings by referring to specific measures it did not order "at this time" and by referring to the possibility of appointing a "monitor to oversee Lufkin's compliance efforts." Mem. & Order at 38. Nowhere did the Court say it would "never" consider more specific measures, or say when it would consider further the use of a monitor.

In the January 18, 2005 Order, the Court properly provided Lufkin with a window of opportunity to participate in a constructive process to craft appropriate injunctive relief provisions that would not only eliminate discrimination, but also accommodate Lufkin's legitimate business needs. The Court did so by providing an 80 day period during which it ordered the parties to meet and confer, report as to the results of their work and their

recommendations for how to proceed further, and appear for a hearing originally scheduled for April 7, 2005.[1] After the entry of the January 18 Order, Lufkin gave every indication that it would refuse to participate meaningfully in this process: it first engaged in a series of evasive and dilatory maneuverings;[2] then filed the motion to vacate addressed in this brief. However, in an about-face that came as a surprise to plaintiffs, Lufkin participated – with both lead defense counsel and Vice President Paul Perez in attendance – in an all-day conference on February 16, 2005, at which the parties had a serious, substantive, and constructive discussion of injunctive relief issues , and agreed to have further discussions. The ultimate outcome of plaintiffs' efforts to engage Lufkin in the process of devising appropriate injunctive remedies against its discriminatory practices is not yet known, and will be reported to the Court in March 2005 pursuant to the January 18 Order. However, Lufkin's initial course of action toward delay and appeal, and inaction toward implementation of the injunction, followed by apparently serious consideration of constructive discussions (while reserving its right to appeal), only serve to underscore the critical need for the further proceedings and continuing court supervision of the

[1] In its Order entered February 14, 2005 (Dkt. 476), the Court continued that date to a later time not yet specified.

[2] On January 19, 2005 – the day the Court's January 18 Order was entered and served – Plaintiffs' counsel wrote to Lufkin's attorneys proposing prompt convening of an in-person meet and confer. On January 20, 2005, Lufkin's counsel wrote to Plaintiffs' counsel proposing to satisfy the Court's meet-and-confer requirement by a telephone conference, and requesting a list of available dates in February. On January 24, 2005, Plaintiffs' counsel responded by providing a list of available dates, beginning with February 1, and further repeating their suggestion that an in-person meeting, in Houston, would be more appropriate and potentially productive. When Lufkin's counsel did not respond, Plaintiffs' counsel reiterated their proposal in a letter sent on January 31, 2005. During a required pre-filing telephonic meet-and-confer of the parties' counsel on the present motion to vacate by Lufkin, held on February 3, 2005, Plaintiffs' counsel again raised the question of an in-person meet-and-confer to comply with the January 18 Order. Lufkin's counsel, in a February 4, 2005 letter, finally offered dates for such a meeting. Plaintiffs' counsel immediately accepted the first offered date, February 16, 2005.

Copies of all of the letters cited in this footnote are attached to the Declaration of Teresa Demchak, filed herewith.

process of developing specific injunctive remedies, as anticipated in and required by the January 18 Order. Therefore, the Court should deny Lufkin's motion to vacate that Order.

I. THE COURT RETAINS THE POWER AND DUTY TO ASSURE THAT COMPLETE AND EFFECTIVE INJUNCTIVE RELIEF IS GRANTED; PLAINTIFFS' MOTION FOR FURTHER PROCEEDINGS, AND THE COURT'S JANUARY 18, 2005 ORDER, WERE PROPER STEPS TO ENFORCE THE COURT'S AUTHORITY AND OBLIGATION.

Upon finding unlawful discrimination in a Title VII case, a 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." Albemarle Paper Co. v. Moody, 422 U.S. 405, 418 (1975), quoting Louisiana v. United States, 380 U.S. 145, 154 (1960). See also, Franks v. Bowman Transp. Co., Inc., 424 U.S. 747, 785-786 (1976) (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). Lufkin's contention that once this Court, having found systemic discrimination, entered its Final Judgment, it could take no further steps to address the remedial duty imposed by Title VII is irreconcilably inconsistent with the sweeping command of the Supreme Court in Albemarle, Franks, and Sheet Metal Workers.

There is extensive authority for the Court's exercise of its power to carry out its orders and enforce Title VII's mandate even as Lufkin pursues its appeal. In Nicol v. Gulf Fleet Supply Vessels, Inc., 743 F.2d 298, 299 & n.2 (5th Cir. 1984), the Fifth Circuit noted that district courts retain jurisdiction to enforce their judgments so long as they have not been stayed or

superseded.[3] The Fifth Circuit has also held that a district court retains jurisdiction to modify a grant of injunctive relief. See Farmhand, Inc. v. Anel Eng'g Indus., Inc., 693 F.2d 1140, 1145-46 (5th Cir. 1982); Resolution Trust Corp. v. Smith, 53 F.3d 72, 76-77 (5th Cir. 1995); see also Int'l Ass'n of Machinists v. Eastern Air Lines, Inc., 847 F.2d 1014, 1018 (2nd Cir. 1988) (Court of Appeals affirmed authority of district court to issue injunction pending appeal).[4] All of the authorities cited in this paragraph uphold the district courts' authority *during the pendency of an appeal*.

The Court's January 18 Order simply reiterates its intention to conduct further proceedings to devise specific measures to enforce its own judgment, including the injunction against ongoing discrimination and the mandatory injunctive order for Lufkin to develop non-discriminatory assignment, promotion, and training systems. These functions are in every way consistent with the Court's power and duty, and the Memorandum and Order. The proper, and only, way for Lufkin to seek to prevent further injunctive relief proceedings during its appeal is to obtain a stay from either this Court or the Court of Appeals. See Federal Rule of Civil Procedure 62(a) ("Unless otherwise ordered by the court, an interlocutory order or final judgment in an action for an injunction … shall not be stayed during the … pendency of an appeal"); Federal Rules of Appellate Procedure 8; Pettway v. American Cast Iron Pipe Co., 411 F.2d 998, 1003 (5th Cir. 1969); Bayless v. Martine, 430 F.2d 873, 880 (5th Cir. 1970). But, curiously, Lufkin has not even sought a stay in the five-plus weeks since the Court entered its Final Judgment and the January 18 Order.

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[3] Lufkin cites Nicol, but it is off-point for Lufkin's purpose. The judgment in Nicol was a dismissal for lack of subject matter jurisdiction; by definition, and unlike the present case, that judgment left no possibility of further proceedings in the trial court.

[4] Lufkin, in its Motion to Vacate at unnumbered page 10, miscites this case for a different proposition, implying that the appellate court found that the district court had abused its discretion in issuing an injunction. In fact, the district court properly issued an injunction, the appellate court held, but on grounds other than Rule 62(c).

The further proceedings initiated by the January 18, 2005 Order are not only proper, but necessary, and must be understood as contemplated by the general and affirmative injunctive orders in the January 13, 2005 Memorandum and Order. Under Federal Rule of Civil Procedure 65(d) "Every order granting an injunction … shall be specific in terms; [and] shall describe in reasonable detail, … the act or acts sought to be restrained." The further proceedings contemplated by the January 18 Order are a necessary and appropriate means of determining the specific features of the mandatory injunctive relief needed to eliminate ongoing discrimination by Lufkin and insofar as possible remedy the effects of past discrimination, while the original prohibitory injunctive relief contained in the Memorandum and Order also remains in effect. In the absence of a stay, this Court's Order for further proceedings on injunctive relief is an exercise of authority that it not only has, but is obligated to use. The Order incorporates a sensible two-stage procedure to provide the complete relief required by Title VII: first, and simply, prohibiting discrimination; and second, after further proceedings, permitting participation by all interested parties,[5] fleshing out the affirmative measures Lufkin will be

[5] This likely will include Lufkin's three Unions. Plaintiffs have invited the Unions to participate and intervene in these proceedings, subject to appropriate limits and conditions. However, to date the Unions have responded slowly and non-specifically to Plaintiffs' invitations, and have neither agreed to participate by invitation nor have they moved to intervene. Specifically, Plaintiffs' counsel wrote to attorneys for the three Unions on January 31, 2005. That letter solicited the Unions' participation in the further injunctive relief proceedings required by the Court's January 18 Order. Ten days later, by letter dated February 9, 2005, the Unions responded by "soliciting" the parties' consent to their intervention, without responding regarding the meet-and-confer process that is the first step required by that Order. The next day, February 10, 2005, Plaintiffs' counsel wrote to the Unions' attorneys, proposing a specific Stipulation and Order for intervention, informing them of the scheduled February 16 meet-and-confer session, and inviting their participation. The Unions did not reply until February 15, when their attorneys sent Plaintiffs' counsel a letter that failed to respond specifically to the proposed stipulation for intervention and did not respond to the invitation to participate in the meet-and-confer session of the parties. To the letter sent by Plaintiffs' counsel on February 17, 2005, asking the Unions to specify the terms of their request for intervention by responding to Plaintiffs' previously-proposed Stipulation, the Unions have not yet responded.

Copies of all the letters cited in this footnote are attached to the Declaration of Teresa Demchak, filed herewith.

required to implement. The motion to vacate that order, and limit the Court's injunctive relief to the first, prohibitory stage, should be denied.

II. LUFKIN MAY PROPERLY BE ORDERED TO PARTICIPATE IN POST-JUDGMENT PROCEEDINGS TO DEVELOP APPROPRIATE SPECIFIC MEASURES OF INJUNCTIVE RELIEF WITHOUT COMPROMISING ITS RIGHT TO APPEAL THE FINAL JUDGMENT.

Lufkin may properly be ordered to participate in proceedings designed to assist the Court to fashion appropriate measures of specific injunctive relief, as the January 18 Order provides, and Lufkin may participate in such proceedings in a constructive manner,[6] without prejudice to its positions that the Court's liability findings were erroneous, the injunction unnecessary, and the Final Judgment should be reversed. The January 18 Order does not require Lufkin to settle the case or to waive its appellate rights, only to participate responsibly as a party in trial court proceedings that will appropriately proceed unless and until a stay is sought and granted or the Court's judgment is reversed on appeal.[7]

For example, in Devex Corp. v. Houdaille Industries, Inc., 382 F.2d 17, 20-21 (7th Cir. 1967), the Court rejected plaintiffs' argument that defendant waived its right to move to vacate a judgment including injunctive relief because defendant had consented to the form of an injunction, where defendant had expressly reserved its rights (as Lufkin has done and plaintiffs have accepted here). In Natural Resources Defense Council v. Pena, 147 F.3d 1012, 1018 (D.C. Cir. 1998), the court held that appellant had not waived its right to appeal from an injunction

[6] As Lufkin appeared ready to do, at the initial meeting of the parties held February 16, 2005. See text at page 2, above.

[7] Lufkin's argument that "[b]y requiring Lufkin to agree to specific injunctive restraints, the district court implicitly requires it to waive its rights to appeal" misconstrues the nature of waiver. It is only a bar to relief if raised by another party. Plaintiffs have not raised this argument, nor will they do so, as they have clearly communicated with Lufkin in letters explicitly stating that they will not take the position that Lufkin's participation in discussions with plaintiffs or proceedings before the Court to implement injunctive relief constitutes acceptance of the basis or propriety of that relief or a waiver of any of Lufkin's appellate rights with respect to either the liability findings or the injunctive relief.

where it moved for expedited entry of the injunction, noting that the "consent-to-judgment waiver doctrine provides that a party that consents to entry of final judgment waives its right to appeal the judgment *unless it expressly reserves that right"* (emphasis added). See also, Brumby v. Bargen, 275 F.2d 46, 49 (7th Cir. 1960) (upholding appellant's right to appeal while observing that "Had [defendant] approved the order for injunction without limitation, then we could well agree with plaintiff's contention [that defendant had waived the right to appeal from the injunction], for then, in fact, it would be a consent order."); Cf. Dugas v. Trans Union Corp., 99 F.3d 724, 725-726 (5th Cir. 1996) (barring plaintiffs' appeal of denial of a class certification motion, because plaintiff had accepted a settlement of the entire action and voluntarily consented to entry of judgment, without reserving a right to appeal the class certification issue).[8]

Thus, to assure that there can be no impediment to Lufkin's full participation in the injunctive relief proceedings required by the January 18 Order, the Court should, in denying the motion to vacate that Order, expressly note that Lufkin has reserved its right to appeal from any further injunctive relief entered by the Court, as well as its underlying liability findings and the initial "cease and desist" injunction. Plaintiffs do not object to such a reservation of rights by Lufkin or a notation by the Court; indeed, we support it as it will free Lufkin of any legitimate rationale for refusing to participate constructively in the injunctive relief proceedings.[9]

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[8] The decision Lufkin relies upon for this point, Amstar Corp. v. Southern Pacific Transport Co., 607 F.2d 1100 (5th Cir. 1979), is, like Dugas, distinguishable because the proceedings under way here are *not* the result of a final judgment consented to by all the parties, but rather an order of the Court to which Lufkin objects even as it obeys the order.

[9] Courts routinely order parties to "meet and confer" on an issue that is simultaneously being contested and/or appealed. See, e.g., North Dakota v. U.S. Army Corps of Engineers, 264 F. Supp. 2d 871, 882 (D.N.D. 2003) (court urged parties to meet and confer about non-judicial remedies while at same time they have opportunity to appeal); Natural Res. Def. Council v. Evans, No. Civ. 02-3805-EDL, 2002 WL 31553527, at *1 (N.D. Cal. 1002) (court directed parties to meet and confer while expressly stating that neither party waived right to appeal); Kennedy v. United Healthcare of Ohio, Inc., 206 F.R.D. 191, 202 (S.D. Ohio 2002) (counsel ordered to meet and confer with Magistrate Judge regarding issuance of notice, while at same time schedule set for briefing issue on appeal if stay sought).

III. LUFKIN'S INVOCATION OF THE ROLE OF ITS UNIONS AND ITS COLLECTIVE BARGAINING OBLIGATIONS PROVIDES NO REASONS IN LAW OR FACT TO AVOID IMMEDIATE IMPLEMENTATION OF INJUNCTIVE RELIEF.

Lufkin argues that its obligation to engage in collective bargaining with its unions precludes the further proceedings ordered by the Court in the January 18 Order. In particular, Lufkin asserts that the "meet and confer" process required by the Court is inconsistent with Lufkin's obligations under the NLRA. Lufkin's argument ignores the facts that the Court has found broad Title VII violations, which it must therefore remedy, and that the meet and confer process is not an independent negotiation between the parties that excludes the unions, but rather an integral part of the Court-ordered remedial process, in which the unions may participate if they wish.

Although Lufkin could not, consistent with the NLRA, collectively bargain with the plaintiffs over seniority and other work rules that would violate provisions of the CBA, to the exclusion of the unions, that is not at all the process ordered by the Court. Instead, the meet-and-confer ordered by the Court is merely a part of the process by which the Court will assure that the systemic discrimination practices it found at Lufkin will be effectively enjoined and remedied. Thus, any meetings between the parties are part of the Court's remedial proceedings, not separate private negotiations that exclude the designated bargaining agents for Lufkin's production employees.

The Court has the duty as well as the power to modify provisions of collective bargaining agreements, or make other remedial orders that may affect collectively bargained matters, in carrying out its obligation to remedy found discrimination. See, p. 3 above. In carrying out that duty, the Court will necessarily undertake tasks that, in the absence of such a finding, could be the business of the parties to collective bargaining: balancing the interests of different groups of employees and the employer. See Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 375-76 (1976). Even if it were necessary to modify the seniority system to effect relief – which the

plaintiffs have agreed and the Court has found it is not[10] – such modifications could be undertaken as part of the process of formulating remedies. Franks v. Bowman Transp. Co., Inc., 424 U.S. 747, 775 (1976) ("we find untenable the conclusion that this form of relief may be denied merely because the interests of other employees may thereby be affected"). The process of striking appropriate remedial balances is not subject to veto by the parties to the union contract, or the wishes of the employee representatives. See, Franks, 424 U.S. at 775 (" 'If relief under Title VII can be denied merely because the majority group of employees, who have not suffered discrimination, will be unhappy about it, there will be little hope of correcting the wrongs to which [Title VII] is directed.' ") (quoting United States v. Bethlehem Steel Corp., 446 F.2d 652, 663 (2nd Cir. 1971). See also Carey v. Greyhound Bus Co., Inc., 500 F.2d 1372, 1377 (5th Cir. 1974) (employer may not use collective bargaining agreement as a shield when discriminatory practices are shown to exist).

Since the remedial processes of the Court are properly viewed as judicial, and not the subject of private collective bargaining, it follows that involvement of plaintiffs in those processes is not merely permissible, but required. The meet-and-confer between plaintiffs and Lufkin is an entirely appropriate form for that involvement to take. Moreover, nothing in the Court's January 18 Order requires the meet-and-confer between the plaintiffs and Lufkin to be private or exclusive of the unions. On the contrary, the Court's prior Order denying the unions' eve-of-trial intervention attempt specifically contemplated that the unions could, if they wish, participate in formulation of the remedy.[11] Consistent with that Order, plaintiffs have invited the

[10] Both plaintiffs, in written submissions, and the Court, in comments at hearings on the Unions' motion to intervene, have made it clear that they are, respectively, not seeking and not considering any changes in the seniority provisions of the collective bargaining agreements. Instead, only changes in the way Lufkin exercises the considerable discretion the collective bargaining agreement cedes to Lufkin's management, which the Court found Lufkin exercises in a way that has unlawful adverse impact on African American employees, are open for consideration. See Plaintiffs' Opposition to Motion to Intervene of IAM Local 1999, GMP Local 429 and Boilermakers Local 587 (Dkt. 333) at pp. 9-12.

[11] Order entered November 18, 2003 (Dkt. 359), at pp. 7-8.

unions to participate in the meet-and-confer process with Lufkin, but the unions have not so far seized this opportunity.[12] Should the unions desire to discuss any possible modifications of or impact to the collective bargaining agreements as a result of the Court's remedial proceedings, they may do so directly with the parties to this case. Should the unions prefer to stay out of the parties' discussions, but make their positions known to the Court, they may seek to intervene in the case.

Whatever role the Unions may eventually play in the judicial process of determining injunctive remedies, Lufkin cannot, on the excuse that it is required to engage in collective bargaining with the unions, avoid the imposition of the Court's Order to develop such remedies in the manner that the Court, in the exercise of its remedial discretion, has seen fit to require. The authorities cited by Lufkin in support of its position on this point are inapposite. Litton Financial Printing Division. v. NLRB, 501 U.S. 190, 198 (1991), like the decision in Laborers Health and Welfare Trust Fund v. Advanced Lightweight Concrete Co., 484 U.S. 539, 544 n. 6 (1988), on which Litton builds, held that an employer could not impose unilateral changes after the expiration of a collective bargaining agreement. Litton does not speak to an employer's duties in the remedial phase of a judicial proceeding. The NLRB decisions in United States Gypsum Co., 94 NLRB 112 (1951), and Engineered Control Systems, 274 NLRB 1308 (1985), which Lufkin also relies on, simply found that those employers, based on an entire course of anti-union conduct, unlawfully refused to bargain collectively with their unions. Here, in contrast, it is the Court, not the company, that decides whether and how specific collectively bargained provisions must be changed, and, as noted above, the Unions have been invited to participate in that process.

[12] See footnote 5 above, describing the correspondence between plaintiffs' counsel and unions' counsel on the subject of the unions' participation in remedial proceedings.

IV. LUFKIN'S COMPLAINTS ABOUT THE PROCEDURES FOLLOWED BY THE COURT IN ENTERING THE JANUARY 18, 2005 ORDER, AND THOSE THAT MAY BE FOLLOWED IN CARRYING OUT THAT ORDER, ARE BASELESS AND PROVIDE NO GROUNDS TO VACATE THE ORDER.

A. Plaintiffs' Role in the Ongoing Proceedings Required by the January 18, 2005 Order Is Neither Inappropriately Judicial Nor in Derogation of the Court's Responsibilities.

In its motion, Lufkin accuses the Court of permitting Plaintiffs to arrogate to themselves the Court's judicial role, and implicitly suggests that the Court is improperly delegating its judicial function to private parties. This mischaracterizes the nature and effect of the Court's assignment of roles in the ongoing injunctive relief proceedings.

Under the Court's January 18 Order, Lufkin must meet and confer with Plaintiffs' counsel and receive the views of Plaintiffs with respect to necessary and appropriate measures of specific injunctive relief. That does not, of itself, mean that either Lufkin or the Court must accept what Plaintiffs propose. Lufkin's observation that "it is still for the Court, **not Plaintiffs**, to make any determination of injunctive relief" (emphasis in Lufkin's brief) is, therefore, self-evident and unremarkable. Likewise, Lufkin's statement that any specific injunctive relief the Court may order "must [be] based on the trial record" leads nowhere because here the trial record, as evaluated *by the Court* in its Memorandum and Order, shows that Lufkin systematically discriminated against the class and that injunctive relief is necessary. Lufkin's accusation that the Court's January 18 Order improperly "delegate[s] the responsibility of making additional findings to the parties to negotiate or to Plaintiffs unilaterally to discern based on their self-serving interpretation of the trial record" is unfounded. Of course, the Court alone retains the power to decide what injunctive relief to order. Any views, proposals or interpretations the Plaintiffs may offer in the process are no more or less than the submissions of advocates for parties before the Court. Lufkin's suggestion that the Court will uncritically adopt whatever the Plaintiffs request it to do, or delegate its responsibility to decide what remedies the law requires to Plaintiffs, demeans the Court.

B. Any Monitor Appointed by the Court to Assist in Further Injunctive Relief Proceedings Will Be Independent of the Plaintiffs, and Responsible to the Court.

In its Memorandum and Order, the Court mentioned the common-sense and pragmatic possibility that "The court may also appoint a monitor to oversee Lufkin's compliance efforts and ensure the smooth implementation of the listed requirements." (Mem. & Order at 38) The

"listed requirements" of that Order include *programs* to assure non-discriminatory allocation of training opportunities and promotions, as well as an end to racial channeling of newly hired production employees. (Mem. & Order at 37) In fashioning and monitoring such programs, a monitor, if appointed, could fill a valuable role. However, the further injunctive relief proceedings ordered in the January 18 Order, and Plaintiffs' role in them, do not conflate the roles of Plaintiffs and Class Counsel as representative parties and advocates, with those of the "monitor" anticipated by the Court. Lufkin's specious assertion that "Plaintiffs cannot appoint themselves as the special master" to make recommendations to the Court for compliance with injunctive relief misrepresents the Court's Order by suggesting that it improperly delegated judicial functions to the Plaintiffs. Instead, any monitor or special master appointed by the Court would, of necessity, be independent of both parties and responsible to the Court, not the parties or their advocates. Fed. R. Civ. P. 53(a)(2) (special master must not have relationship with, inter alia, parties or their counsel that would constitute bias or appearance of bias); id. Rule 53(g) (any action taken on special master's recommendations or reports is function of the court); Ruiz v. Estelle, 679 F.2d 1115, 1161-62 (5th Cir. 1982).

Lufkin's motion to vacate appears to contemplate and accept the possibility that the Court may "believe[ ] it needs assistance in establishing a process to implement its original injunction or to monitor compliance" and that therefore "it may be appropriate to appoint an independent, judicial officer as a special master to undertake this task and make any necessary recommendations for the Court's consideration." Plaintiffs strongly second this suggestion, and welcome the indication that the actual positions of Lufkin may not differ from Plaintiffs on this point to the extent suggested by the overheated rhetoric of Lufkin's brief. Plaintiffs have given some thought, and made certain inquiries, along these lines, and while the present brief is perhaps not the occasion to discuss Plaintiffs' suggestions in any detail, we would welcome the

opportunity to submit proposals for the Court's consideration, preferably but not necessarily after consultations between the parties.[13]

C. The Court's Prompt Entry of the January 18 Order Was Not Procedurally Improper.

Lufkin's complaints about the speed with which the Court granted Plaintiffs' motion for further proceedings on injunctive relief provides no grounds to vacate the January 18 Order. Many times in the course of these proceedings, the Court has exercised its inherent power to regulate proceedings and rule on matters pending before it simply and quickly, without prolonging proceedings. In many cases, those rulings have come before Plaintiffs' counsel could submit memoranda on pending motions or matters. The January 18 Order is a particularly apt example of the Court's exercise of its case management powers because that Order can be seen as merely carrying out its decision in the case, as set forth in the Memorandum and Order, rather than addressing a new subject. In any event, Lufkin's point is now moot. Lufkin has raised all of the points it has in opposition to the relief sought in Plaintiffs' original motion, in the context of the pending Motion to Vacate, and will receive the Court's rulings, and reconsideration of the relief Lufkin opposes, when the Court next rules on this aspect of the case based on the parties' full briefing.

D. The Court Should Ignore Lufkin's Efforts to Ascribe Purely Financial Motives to Plaintiffs and Their Counsel.

At several points in its Motion to Vacate, and in particularly unprofessional and uncalled-for language, Lufkin suggests that the motivation of Plaintiffs and their counsel in suggesting the meet-and-confer process ordered by the Court in the January 18 Order was to run up attorneys' fees. This accusation is as baseless as it is mean-spirited. The objective of Plaintiffs and the Class Counsel in seeking further injunctive relief proceedings and more specific measures of injunctive relief is, of course, to vindicate the rights of African American employees to real, and not just nominal, relief in this case. That providing the complete remedy Title VII promises may

[13] For example, the Court might appoint a Magistrate of this or a nearby District to assist in further injunctive relief proceedings. Plaintiffs have identified several retired or former District Judges in Texas who might, if available, provide stature, authority, expertise, and the ability to devote time to the proceedings. There are also a number of experienced attorneys who have in other cases carried out assignments of this nature by other courts, or have the interest and ability to do so, and who would provide unbiased, expert services to assist the Court in its proceedings.

take more attorney time than leaving the fulfillment of that promise to Lufkin's unsupervised and questionably reliable good faith is a truism, but not the basis for suggesting improper motives. "Plaintiffs' attorney are, of course, not required to reduce or otherwise trim the time they spend on actions such as this, merely because the litigation will be protracted." Ruiz v. Estelle, 553 F. Supp. 567, 576 (S.D. Tex. 1981).

As the Court is well aware, and has repeatedly seen, Lufkin's obstructive tactics, raising of spurious issues, refusal to carry out Court orders when first made, and unnecessary motion practice have themselves greatly compounded the time necessary for Class Counsel to represent Plaintiffs effectively in this case. It ill behooves Lufkin, in a pleading filed by defense counsel who have conducted the litigation as they have, to ascribe to Plaintiffs' attorneys a purpose of increasing the amount of their fees. In any event, the issue is a red herring. The Court should do what is necessary and appropriate to provide effective injunctive relief, including the meet-and-confer process required by the January 18 Order, without regard to the possibility that doing what will result in a just outcome may cost more than doing the least possible, and inevitably postponing the time when that just outcome will be obtained, while Lufkin seeks to overturn the Court's orders on appeal. Finally, in a case as contentious as this one, the potential efficiencies of a constructive meet-and-confer process are likely to reduce, not increase, the attorneys' fees compared to what would be incurred if the parties' only dialogue is through pleadings.

CONCLUSION

The Court should deny Lufkin's Motion to Vacate the Court's Order of January 18, 2005.

Dated: February 22, 2005

Respectfully submitted,

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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 by sending same via electronic filing to:

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/S/
Teresa Demchak