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' STATUS REPORT ON MONETARY RELIEF PROCEEDINGS AND REQUEST FOR SCHEDULING ORDER FOR RESOLUTION OF DISPUTED MONETARY RELIEF ISSUES

Plaintiffs submit this Status Report to inform the Court of developments in the parties' discussions of monetary relief issues since the entry of the Court's Orders of June 19, 2009,[1] to advise the Court of those issues and damages amounts on which the parties have reached agreement, and to request a further order deciding one outstanding issue that is now ripe for resolution and setting a schedule for resolving other matters on which the parties have not agreed.

A. Review of Prior Orders and Outstanding Issues

Plaintiffs and Defendant Lufkin submitted a Joint Status Report on Back Pay Issues (Dkt. 620) on March 31, 2009, in which they informed the Court of a number of matters on which they had reached agreement and of several issues disputed by the parties and therefore to be decided by the Court. Subsequently the parties narrowed the issues in dispute at that stage of proceedings to three: (1) whether the time periods March 6, 1994-December 31, 1995, 2003-2004, and 2005-2007 should be included in the class back pay period; (2) whether back pay should be awarded for discrimination in promotions to salaried positions; and (3) the proper rate of pre-judgment interest. The parties submitted various pleadings on these issues in April and May 2009.[2]

In its June 19 Orders, the Court made the following rulings: (1) The 1994-1995 and 2003-2004 time periods must be included in the calculation of class back pay, since the prior rulings of Judge Cobb, affirmed by the Court of Appeals, are law of the case (Dkt. 647 at 3-7). (2) Additional evidence would be required for the Court to determine whether to award back pay for the time period 2005-2007 (*Id*. at 7-8). (3) Pre-judgment interest must be awarded at a rate of 5% per annum, based on both law of the case doctrine and the Court's exercise of its sound rate-setting discretion (*Id.* at 8-11). (4) Lufkin's Motion for Partial Summary Judgment on Plaintiffs'

[1] Order re: Motion for Partial Summary Judgment (Dkt. 646) and Order re: Damages (Dkt. 647).

[2] *See*, Plaintiffs' Brief on Disputed Back Pay Issues, filed April 17, 2009 (Dkt. 629); Defendant Lufkin's Position on Disputed Issues for Calculation of Monetary Relief, filed April 17, 2009 (Dkt. 631); and Defendant Lufkin's Amended Motion for Partial Summary Judgment, filed April 17, 2009 (Dkt. 632), together with Plaintiffs' Response, filed May 1, 2009 (Dkt. 637), and Lufkin's Reply, filed May 12, 2009 (Dkt. 641).

claims of discrimination in promotions to salaried positions was denied based on both law of the case doctrine and alternatively on the Court's finding that the evidence shows discrimination in such promotions (Dkt. 646 at 4-8).

After the Court entered its June 19 Orders, the parties resolved certain other matters. Specifically, the parties stipulated that for the period of 2005-2007 Plaintiffs should be awarded $159,412, exclusive of interest, in damages for hourly promotions (and no damages for salaried promotions) (Dkt. 648). The Court entered an Order adopting that stipulation on July 2, 2009 (Dkt. 650).

As a result of the proceedings summarized above, the parties were then, and are now, in agreement that the following amounts of class back pay (damages) should be awarded to Plaintiffs; these amounts are exclusive of interest at a rate of 5% per annum, the exact amount of which is to be determined when judgment is entered:[3]

	Hourly promotions	Salaried promotions
1994-1995	$ 483,340	$ 109,868
1996-2002	$1,901,417	$ 128,055
2003-2004	$ 487,756	0
2005-2007	$ 159,412	0
Total award	$3,031,925	$ 237,923

Total award for hourly plus salaried promotions - $3,269,845

Two matters remain in dispute: (1) whether the 5% annual pre-judgment interest on the damages award is to be simple or compound; and (2) how the class back pay award is to be

[3] All amounts in the following table, except for the 2005-2007 amount and the totals, are recited at page 2 of Lufkin's Status Report filed April 17, 2009 (Dkt. 631), and accurately summarize the parties' agreements as to those amounts. The 2005-2007 number was fixed by separate stipulation of the parties and Order of the Court thereon (Dkt. 650). The totals are determined by simple addition.

allocated or distributed among the class members. The remainder of this Report addresses those two matters.

B. Pre-Judgment Interest Should Be Compounded.

Plaintiffs have repeatedly requested Lufkin, through its counsel, to acknowledge that the pre-judgment interest award should be compounded annually; however, Lufkin has not agreed to do so.[4] The Court should resolve the question by ruling that in calculating pre-judgment interest, a rate of 5%, compounded annually, must be used.

Judge Cobb's Amended Final Judgment specified that, "Pre-judgment interest is to be awarded at the rate of 5%, compounded annually" (Dkt. 552 at 34). Lufkin did not appeal from the award of pre-judgment interest or the rate fixed by the Court. Although the Fifth Circuit did not affirm the particular method adopted by Judge Cobb to calculate class back pay, it did not disturb or comment on the award of interest. In their Brief on Disputed Back Pay Issues filed April 17, 2009 (Dkt. 629), Plaintiffs argued that interest had to be calculated at a 5% annual rate, on a compounded basis, as Judge Cobb had ordered. *See*, *id*. at 15-16. In its Amended Position on Disputed Issues for Calculation of Monetary Relief filed April 20, 2009, Lufkin sought a different, lower rate and asserted, without argument, that simple interest only should be awarded (Dkt. 633 at 10-11). In its June 19 Order re Damages, the Court ruled on what it described as Lufkin's "assert[ion] that this court can, and should, reexamine Judge Cobb's assessment of pre-judgment interest at a rate of 5%, compounded annually" (Dkt. 647 at 1). Although the Court

[4] On July 17, 2009, Plaintiffs' attorneys Morris J. Baller and Teresa Demchak had a conference call with Defendants' attorneys Douglas E. Hamel and Christopher Bacon. In that call, Mr. Baller stated that in Plaintiffs' view interest had to be calculated on a compound basis because Judge Cobb's order awarding back pay had specified compound interest, and this Court's June 19, 2009 Order held Judge Cobb's assessment of interest to be law of the case (Dkt. 647 at 8-9). On July 27, 2009, Mr. Baller sent both Mr. Hamel and Mr. Bacon an email again requesting agreement or discussion of the issue. On July 28, 2009, Mr. Bacon acknowledged that the question was pending but stated that he could not answer it at that time because Mr. Hamel was on vacation until the following week. On the same date, Mr. Baller responded by an email to Mr. Bacon asking for a conference call on the matter during the following week, after Mr. Hamel's return from vacation. To the present date, Lufkin has neither communicated its position on the compounding of interest, nor responded to Plaintiffs' counsel's request for a conference on the issue.

ruled that "Prejudgment interest shall be calculated at the rate of 5% per annum," (*id*. at 11), it did not explicitly address the question of compounding.

Although the Court's June 19, 2009 Order does not expressly require (or deny) compounding of interest, the Order's logic requires compounding. The principal basis for the Court's ruling was that Lufkin had waived any challenge to the interest awarded by Judge Cobb and Judge Cobb's ruling was law of the case. *See*, Dkt. 647 at 8-9. Judge Cobb's order requiring the compounding of the interest award is no less settled as law of the case than is his selection of the 5% annual interest rate.

In addition, this Court held in the alternative that, as a matter of the proper exercise of his remedial discretion, Judge Cobb's choice of a 5% rate was proper (*id*. at 9-11). In the course of its discussion, this Court took note of several factors that strongly support compounding of interest here. (1) Texas law specifically provides for the rate of post-judgment interest but not pre-judgment interest, and "general principles of equity and the common law permit application of the post-judgment rate" in determining pre-judgment interest (*id*. at 10). While the applicable federal statute does not address whether pre-judgment interest should be compounded, it specifies that post-judgment interest "shall be compounded annually," 28 U.S.C. §1961(b). Compounding of pre-judgment interest is the only result consistent with the combination of principles embodied in federal and state law. (2) This Court further noted the inequity caused by Lufkin's having been "profiting for years from its policy of unlawful discrimination," earning returns of 11% while indulging in extravagant compensation of its executives, yet opposing interest sought by wage earners victimized by its discriminatory practices "on the pay Lufkin illegally denied them for more than a decade" (Dkt. 647 at 10). Further, the Court correctly noted that its exercise of discretion in determining interest must properly reflect Title VII's "make whole" remedial principle (id.). The same principles of equity extend to and require compounding of interest.

C. The Court Should Require Lufkin to Negotiate Based on Plaintiffs' Proposed Principles for Allocation of the Class Back Pay Award Among Class Members, and Order the Parties to Submit a Detailed Distribution Plan Within a Reasonable Period.

In their March 31, 2009 Joint Status Report to the Court, the parties anticipated that, once the amount of the class back pay award had been determined, they would likely be able to agree on a method for its distribution to members of the class (Dkt. 620 at 2, item (7)). Subsequently, the parties have on a number of occasions had relatively brief discussions of general principles for determining allocations to class members, and have appeared to be in general agreement on certain broad principles. In late July 2009, the parties agreed that Plaintiffs would submit a specific proposal to Lufkin for an allocation plan, and that Lufkin would respond to Plaintiffs' proposal in a conference call the following week. On August 3, 2009, Plaintiffs delivered a written proposal to Lufkin's counsel.[5] Lufkin has not, as of this date, responded in any way to Plaintiffs' written proposal.

In the absence of any written response by Lufkin – or for that matter any oral response since Plaintiffs have spelled out in writing and detail what they propose – Plaintiffs believe that, at a minimum, the parties are in agreement on several aspects of a distribution plan: (1) The plan should be kept simple both for efficient and accurate administration and so that its features are comprehensible to affected individuals. (2) All class members should receive a specified minimum amount without regard to how long they worked during the class back pay period. (3) The large majority of the class back pay should be allocated among class members in proportion to the amount of time they worked during the class period. (4) Eligibility for time-worked payments would be limited to those class members who completed at least a specified minimum period of employment (conceptually necessary for employees to qualify for any promotions at Lufkin).

[5] A copy of this proposal is attached as Exhibit 1 to this Status Report. By reference to it, the Court will see that while the broad outlines of a distribution plan may be simple and, we hope, non-controversial, the details and mechanics are complicated enough to require some sustained attention and careful drafting.

Plaintiffs' proposed distribution plan fills in many details about the principles agreed upon at a general level. For example, it specifies a proposed amount of minimum payment to all class members ($250) and a proposed minimum tenure period for eligibility for time-worked payments (90 days). In the interest of simplicity, it proposes to treat all time worked during the class period – whether in hourly or salaried positions and in whatever year – as having equal weight for purposes of allocation of back pay. Other specific provisions and issues not yet discussed by the parties are also set out in Plaintiffs' proposal.

Two main areas of complexity in the implementation of a distribution plan – one potential, and one unavoidable - are also broached in Plaintiffs' proposal. The areas of complexity are these: (1) Defendant Lufkin has on a number of occasions indicated that it may appeal the Court's denial of its motion for Partial Summary Judgment with respect to the inclusion of the 1994-1995 time period and/or the award of back pay for discrimination in salaried promotions (which is based on a statistical argument that, according to Lufkin, turns on whether 1994-1995 data is considered in the adverse impact analysis). Should Lufkin appeal the portion of the Court's judgment attributable to the 1994-1995 period but not the remainder of the judgment, it may be desirable for the Court's judgment to divide the amounts of back pay and interest awarded into separate amounts for those two time periods, so that the non-appealed portion of the judgment can be apportioned and paid without further delay. If the judgment is to be divided into separate portions in this manner, the specific provisions for the allocation will necessarily be more complicated than if no differentiation by time period is necessary. Plaintiffs' counsel have on a number of occasions asked Lufkin's counsel to advise whether Lufkin will appeal the ruling regarding liability for promotions in 1994-1995 and to salaried positions; however, Lufkin has not stated whether it will do so. (2) The allocation plan will also have to determine how to divide interest among the class members. While the parties may agree on the simplifying assumption that the formula should not differentiate between time worked in different years and positions in allocating principal amounts of back pay, it is not appropriate – at least in Plaintiffs' view – to treat interest payments in the same manner, since interest on

damages that accrued in the mid-1990s is properly viewed as much greater than interest on damages that accrued a decade later. Therefore the allocation formula for the interest to be awarded by the Court should be different from, and more complicated in its calculation, than that for back pay before interest.

Lufkin has not informed Plaintiffs that it opposes (or agrees to) any of their specific proposals, and Plaintiffs are not suggesting that Lufkin has been unreasonable in its positions to date on the allocation issues. However, Plaintiffs are concerned at the pattern – evident in Lufkin's failure to respond regarding the issue of compound interest and the possible appeal of the award for 1994-1995 and salaried positions – of failing to come to grips with the issues in a timely manner that will permit the Court to enter its judgment without undue delay.

D. Plaintiffs' Request for Scheduling Order

For these reasons, Plaintiffs request that the Court issue an order requiring the parties to meet and confer regarding all of the outstanding issues relating to back pay, including the allocation plan, and to submit to the Court their joint or separate proposals for the back pay judgment, on a relatively short but feasible schedule.[6] The parties will be better able to address the monetary relief issues and submit their views on the form and amount of the judgment, as a whole or divided in two portions, after the Court has ruled on whether the pre-judgment interest award is to be calculated with annual compounding.

Plaintiffs therefore request that: (1) The Court accept this Status Report as setting forth Plaintiffs' arguments on the issue regarding compounding of interest, and require Lufkin to respond stating its position and, if that position is contrary to Plaintiffs', its arguments, within one week. (2) The Court thereafter issue its order on the compounding of interest issue and direct the parties to meet and confer regarding all other outstanding issues and, within three weeks after the date of the Court's order, submit their joint or separate positions on the form and

[6] This process is similar to that ordered by the Court for submission of positions on the remaining injunctive relief issues in its Minute Order entered August 19, 2009 (Dkt. 658).

amount of the monetary judgment, including principles for distribution of back pay among class members.

Dated: August 21, 2009

Respectfully submitted,

By: /S/ Morris J. Baller

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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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on this 21st day of August 2009.

/S/
Morris J. Baller