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' SUR-REPLY IN OPPOSITION TO DEFENDANT LUFKIN INDUSTRIES, INC.'S MOTION TO VACATE THE ORDER OF JANUARY 18, 2005

Defendant Lufkin Industries, Inc.'s ("Lufkin") Reply to Plaintiffs' Opposition to Lufkin's Motion to Vacate the Court's January 18, 2005 Order is a mishmash of arguments, all irrelevant or off point, but aimed at halting the remedial proceedings the Court has the authority and, given the Court's findings of systemic discrimination against African Americans by Defendant, Lufkin Industries, Inc., the obligation to conduct.

1. The Court Has the Authority to Oversee the Development of a Remedial Plan

Lufkin's claim that Plaintiffs "improperly suggest that the Court has the authority to rewrite its injunction," Reply at 3, ignores a crucial fact: this Court entered its January 18, 2005 order in response to a timely post-judgment motion by Plaintiffs before Lufkin filed its notice of appeal. Plaintiffs' motion for further proceedings, although not styled as a Federal Rule of Civil Procedure 59(e) motion to alter or amend, sought relief that included the entry of further and supplemental orders regarding the specific remedial steps Lufkin must take to address the discriminatory practices found by the Court, and therefore contemplated amendment or alteration of the Court's original Memorandum and Order and Judgment regarding injunctive relief. See Moody Nat'l Bank v. GE Life and Annuity Assurance Co., 383 F.3d 249, 251 (5th Cir. 2004) (in determining the import of a post-judgment motion, "a motion's substance, and not its form, controls").

Plaintiffs' motion and the January 18, 2005 Order thus suspended the time for filing an appeal until such further proceedings are completed and the Court enters the further and supplemental remedial orders.[1] See Federal Rule of Appellate Procedure 4(a)(4). It is well established that a notice of appeal filed prior to the disposition of a timely Rule 59(e) motion is premature. Osterneck v. Ernst & Whinney, 489 U.S. 169, 173-74 (1989); Harcon Barge Co., Inc.

[1] In filing their cross-appeal on the non-monetary injunctive relief provisions of the Memorandum and Order and Final Judgment, expressly noted that "the Court has scheduled further proceedings on the specific remedial steps Lufkin must take to comply with the Court's injunction entered on January 13, 2005, and that further orders entered by the Court pursuant to those proceedings may negate Plaintiffs limited appeal." See Plaintiffs' Cross Appeal (Dkt. # 491) at n. 1.

v. D & G Boat Rentals, Inc., 784 F.2d 665, 666 (5th Cir. 1986). All of the authorities cited by Lufkin, both in its Motion to Vacate and Reply, pertain to situations in which a district court modified an injunction while the case is on appeal. That is not the situation here, where the Court acted before Lufkin filed its appeal, and the Court's January 18, 2005 Order, effectively tolled the time for appeal and assures that jurisdiction to alter or amend the injunction remains with this Court.

2. Lufkin's Claim that it Is Taking Measures To Comply With the Injunction Does Not Mean this Court Does Not Have Jurisdiction to Fashion More Specific Remedies to Ensure Such Compliance and to Address the Discriminatory Practices the Court Found.

For the first time, Lufkin reports that it "has in fact taken measures consistent with the Court's original injunction." Reply at 2. Of course, this is what Lufkin must do, since the Court's order has not been stayed or reversed.[2] Nevertheless, whether or not Lufkin has taken measures consistent with the original injunction is irrelevant to the question of whether the Court can and must, pursuant to Federal Rule of Civil Procedure 65(d) enter orders that identify the specific steps Lufkin must take to implement the injunction and address the discriminatory practices found by the Court. See Fed. R. Civ. P. 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.")

3. Lufkin Overstates the Waiver Argument

Lufkin's attempt to avoid compliance with the Court's January 18, 2005 Order by claiming that in doing so it will waive its right to appeal from any further remedial orders entered by the Court overstates the law on waiver in the Fifth Circuit. See Dugas v. Trans Union Corp.,

[2] It is, however, noteworthy that Lufkin does not advise the Court of what "measures" it has taken and that Lufkin refused to explain the "measures" to Plaintiffs' counsel when the parties met on February 16, 2005, pursuant to the January 18, 2005 Order's directive that the parties "meet and confer" about remedies. Plaintiffs, furthermore, have serious questions regarding whether the measures Lufkin is taking are being taken in good faith and consistent with the Court's January 18 Order, and we will bring those concerns to the Court directly within the next several days.

99 F.3d 724, 726 (5th Cir. 1996) (barring appeal when plaintiff accepted the settlement, but indicating that this result was necessitated by the fact that plaintiff's acceptance was made without expressly reserving a right to appeal). Moreover, Lufkin's contention that Plaintiffs ignored and failed to call the Court's attention to controlling Fifth Circuit precedent regarding waiver, Amstar Corp. v. Southern Pacific Transport Co., 607 F.2d 1100 (5th Cir. 1979), see Reply at 1, is false. Plaintiffs cited and distinguished – correctly – that case in their Opposition. See Opposition (Dkt. #480) at 7 n. 8.

4. Once Again, Lufkin Insists on Hiding Behind the Unions

Just as during the liability phase of this case, Lufkin again seeks to use the unions as a shield to protect it from having to take action to correct its own unlawful practices. Lufkin's arguments regarding the unions are irrelevant and beside the point. The issue is not whether the unions can intervene at this stage of the litigation – they can, but have not chosen to do so.[3] Accordingly, Lufkin's reference to Edwards v. City of Houston, 78 F.3d 983 (5th Cir. 1996), is wholly irrelevant. Moreover, despite Lufkin's claims that the unions are essential, it has, inexplicably, not chosen to join them as parties to the litigation.

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[3] Lufkin's reference to the stipulation Plaintiffs proposed to the unions is gratuitous. The proposed stipulation seeks limits on the terms of the unions' intervention, which the Court would have the discretion to impose on an intervenor, see, Stringfellow v. Concerned Neighbors in Action, 480 U.S. 370, 378 (1987); Harris v. Amoco Prod. Co., 768 F.2d 669, 675 (5th Cir. 1985) (noting that "the district court has a concomitant prerogative – as an outgrowth of its discretionary power to withhold permission altogether – to condition the intervention so as to minimize delay and not prejudice the existing parties."), and which Plaintiffs have advised the unions they would seek upon the unions' intervention. See Letter dated Feb. 25, 2005 from T. Demchak and T. Garrigan to M. Satter, R. Tanner and D. Carona, attached hereto as Exhibit A.

5. Conclusion

For all of the reasons discussed above and in Plaintiffs' Opposition, the Court should deny Lufkin's Motion to Vacate the January 18, 2005 Order.

Dated: March 2, 2005

Respectfully submitted,

By: /S/

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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 2nd day of March, 2005.

/S/
Teresa Demchak