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U.S. DISTRICT COURT
N.D. OF ALABAMA

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

MARION WATERS,	)	
	)	
Plaintiff,	)	
v.	)	**CASE NO. 07-CV-0394-LSC**
	)	
COOK'S PEST CONTROL, INC.,	)	
	)	
Defendant.	)	

PLAINTIFFS' BRIEF IN SUPPORT OF MOTION FOR FINAL APPROVAL OF CLASS SETTLEMENT, ATTORNEY FEE AWARD AND OTHER RELIEF

INTRODUCTION

The efforts of the representative plaintiff, the defendants, and their respective counsel have yielded a class action settlement providing monetary and non-monetary benefits for employment applicants for positions at Cook's Pest Control, Inc. ("Cook's"). Plaintiff Marion Waters filed this lawsuit on behalf of himself and other African-American applicants or individuals denied employment or discouraged from applying for jobs with Cook's because of their race. The terms of this settlement will provide Cook's employees with training and hiring procedures developed to eliminate race discrimination in the workplace. The settlement will also provide monetary relief for African-American class members who applied for, but were denied, employment at any Cook's location during a specified period.

The parties now request that this Court certify the settlement class and give its final approval on the settlement. The parties request approval of the incentive award to the representative plaintiff who helped further the lawsuit. Finally, Class Counsel have elected

to use the "common fund" method of determining reasonable attorneys' fees in this matter, in order to eliminate the Court's need to for an hour-by-hour review.[1] Class Counsel requests an attorneys fee award of 35% of the common settlement fund which equals $875,000.00 plus reasonable litigation expenses in the amount of $53,831.55.

PROCEDURAL HISTORY

This class action was filed by Plaintiff Marion Waters on February 28, 2007. (Doc. 1). The Complaint as amended on July 17, 2007, asserts claims for violation of Title VII and 42 U.S.C. §1981 for failure to hire based on race. (Doc. 3). Cook's moved to dismiss all of the Plaintiffs' claims, which was denied on January 28, 2008. (Doc. 7, Doc. 25). The defendant answered the complaint on February 11, 2008. (Doc. 27).

On June 5, 2008, Defendant filed a motion for summary judgment, which was denied without prejudice, on December 9, 2008. (Doc. 59). On December 6, 2010, the parties filed a joint motion to stay this action pending mediation, which was granted. (Doc. 110). Extensive discovery on the merits has been conducted regarding disparate impact and pattern and practice disparate treatment race discrimination claims of the Named Plaintiff and Class Members. The Parties have employed experts to assist in evaluating data and statistical evidence. In addition, there was extensive motion practice concerning discovery, including motions to compel discovery and motions for protective orders.

MEDIATION AND SETTLEMENT

Counsel for the parties participated in mediation beginning in December, 2010. The

[1] *See Loranger v. Stierheim*, 10 F.3d 776, 783 (11th Cir. 1994)(The Eleventh Circuit has recognized that "an hour-by-hour review is both impractical and a waste of judicial resources.").

parties chose Hunter R. Hughes of the law firm Rogers & Hardin, LLP in Atlanta, Georgia as mediator. The Settlement Agreement that has resulted is the product of litigation, discovery and a protracted and intensive mediation process. A settlement agreement was reached in October 2011 and, on November 3, 2011, a Joint Motion for Preliminary Approval of the Settlement was filed with this Court. (Doc. 120). The same was granted on January 27, 2012. (Doc. 123). The Court preliminarily certified the settlement class and approved the form of notice. (Doc. 123). The Court appointed Plaintiff's counsel as Class Counsel; Tommy Warren and Settlement Services, Inc., as Claims Administrator; and Professor James Coleman, of Duke University, as Monitor. (Doc. 123).

Following the Court's decision to preliminarily approve settlement and certify the settlement class, notice was mailed to applicants who applied for employment with Cook's during the settlement period. (Fisher Decl., ¶ 23). Notices were also published in online and print versions of newspapers of general circulation in localities where Cook's has a district office. (Fisher Decl., ¶ 23).

The settlement has met with overwhelming approval by the settlement class members. The deadline for objections and opt-outs was April 12, 2012. (Fisher Decl., ¶ 24). As of the deadline, 297 putative settlement class members have submitted claim forms. (Fisher Decl., ¶ 24). No settlement class member has objected or opted out. (Fisher Decl., ¶ 24). Thus, 100% of the settlement class has either actively or passively accepted the benefits of the settlement. (Fisher Decl., ¶ 24).

SUMMARY OF SETTLEMENT TERMS

The Settlement Agreement defines the Settlement Class as follows:

All African-Americans who applied for employment at any Cook's location

> from March 1, 2005 through the date of preliminary approval, and who were denied employment, excluding all judicial officers or employees of the Federal Courts within the second degree of affinity; employees of Plaintiff's counsel; and any other person whose presence in the class would cause mandatory recusal of any judge assigned to the case.

The settlement fund consists of $2,500,000, which includes all costs and fees ("Settlement Fund"). Cook's will be responsible for all costs and expenses of the settlement administration. The payment to the Settlement Fund will be in two installments: one installment in the amount of $1.5 million will be paid on or before 30 days after the date of final approval of the Decree, and will include payment of attorney's fees. The remaining balance of the settlement payment will be paid no later than the end of the first week of January 2013.

The Consent Decree will provide for a Rule 23(b)(2) and Rule 23(b)(3) settlement class that would cover all of Cook's facilities for all African-Americans who applied for the positions addressed in the Complaint. The Decree will also provide for a general release by the Named Plaintiff of all claims of every type. The Named Plaintiff will receive an incentive payment, in the amount of one and one-half times the maximum amount paid to a settlement class member, to be paid out of the Settlement Fund. Each member of the Settlement Class who receives compensation under the Decree will give a release of all claims relating to Cook's failure to hire them.

The length of the Decree shall be three years, but may be extended to a maximum of four years, to the extent necessary to resolve any challenges still pending with the Monitor at the end of three years. The Decree will also include the following terms:

- With the assistance and approval of the Monitor, Cooks will establish objective, facially neutral hiring criteria that shall be used in the hiring process for the positions of sales, pest control technician, or termite technician during the term of

the Decree.

- Cook's will hire qualified applicants at each facility without regard to race.
- Cook's CEO will issue to all employees a statement affirming Cook's anti-discrimination policy and describing its implementation and the reporting process if they believe a violation has occurred.
- Cook's will institute periodic training of its hiring and other management and supervisory personnel relative to the terms of the Decree, non-discriminatory hiring and other terms and conditions of employment.
- Cook's will put in place mutually agreed upon recordkeeping procedures that shall include the compilation by each facility of applicant flow data by race, the number of Monitored Position hires by race, and a summary of the reasons for selection/rejection of each applicant for the Monitored Positions.

ARGUMENT

I. THIS COURT SHOULD CERTIFY THE SETTLEMENT CLASS.

The party seeking to certify a class bears the burden of showing that the requirements of Rule 23 have been met. *Amchem Products, Inc. V. Windsor*, 521 U.S. 591 (1997). "Whether to certify a class action rests within the sound discretion of the district court." *In re Healthsouth Corporation Securities Litigation*, 257 F.R.D. 260, 270 (N.D. Ala. 2009)(*citing Cooper v. Southern Co.*, 390 F.3d 695 (11th Cir. 2004). This discretion must be exercised pursuant to the dictates of Rule 23. *Id.* In evaluating a motion for class certification, the allegations of the complaint should be taken as true and the Court is to assume that cognizable claims are stated. *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177 (1974).

A. The Proposed Settlement Class Meets the Requirements of Rule 23(a).

The elements of Rule 23(a) are: (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3)

the claims or defenses of the representative parties are typical of the claims or defenses of the class; (4) the representative parties will fairly and adequately protect the interests of the class. Fed.R.Civ.P. 23(a). These requirements are often referred to as numerosity, commonality, typicality, and adequacy of representation, and often tend to overlap and merge. *Amchem*, 521 U.S. at 626 n. 20. This action satisfies all the requirements of Rule 23(a).

Plaintiff Marion Waters has standing to bring the claims raised in the complaint and has timely filed an EEOC charge alleging race discrimination in hiring, thus exhausting his administrative remedies. Additionally, Plaintiff has properly alleged that the injuries of which he complains occurred as a direct consequence of Defendant's discriminatory hiring practices and policies. The individual claims of the Plaintiff and the claims of the settlement class of members he seeks to represent all arise from the same or similar discriminatory hiring practices and policies.

1. Numerosity.

Plaintiff must show that the settlement class is so numerous that joinder of all members is impracticable. Rule 23 (a)(1). In the Eleventh Circuit, classes of more than forty persons are generally held to satisfy the numerosity requirement. *See Cox v. American Cast Iron Pipe Co.*, 784 F.2d 1546, 1553 (11th Cir. 1986). Even where the exact number of persons in the class cannot be determined with precision, a district court may make "common sense assumptions regarding numerosity. *Evans v. U.S. Pipe & Foundry*, 696 F.2d 925, 930 (11th Cir. 1983).

In this case, the settlement class which Plaintiff seeks to represent is currently made up of thousands of African-American applicants. (Fisher Decl., ¶ 18). The settlement class

members applied at various Cook's locations that are geographically dispersed throughout Alabama, Georgia, Mississippi and Tennessee. (Fisher Decl., ¶ 18). Joinder of all or even a substantial percentage of settlement class members before this Court as individual plaintiffs would be impracticable. (Fisher Decl., ¶ 18).

2. Commonality

Plaintiff must also show that there are questions of law or fact that are common to the class. Rule 23(a)(2). This is a "minimal standard" that "merely requires an identity of some factual or legal matter among members of the class." *Healthsouth*, 257 F.R.D. at 274, *citing Hudson v. Delta Air Lines, Inc.*, 90 F.3d 451, 456 (11th Cir. 1996). It is not necessary for all questions of law or fact to be common to the class. *Id.*

Plaintiff alleges, on behalf of himself and the prospective settlement class, that the Defendant has a pattern or practice of discrimination that results in African-American applicants being denied employment. (Fisher Decl., ¶ 19). These questions are common to every potential class member and must be analyzed by the same class-wide statistical analysis that applies to all applicants. (Fisher Decl., ¶ 19). The common focus was not on individualized fact situations but a pattern of discriminatory decision making and a combination of statistical, historical and anecdotal evidence. (Fisher Decl., ¶ 19). As the individual facts alleged by Plaintiff are manifestations of Defendant's uniform policy and practice of race discrimination, Plaintiff has shown that there are questions of law or fact that are common to the settlement class.

3. Typicality

Plaintiff is required, pursuant to Rule 23(a)(3), to show that the claims of the representative party are typical of the claims of the class. In this case, the named Plaintiff

herein and the members he seeks to represent, challenge the same unlawful course of conduct. This alignment of interests assures that the absentees' interests will be fairly represented. Typicality and commonality tend to merge as they are focusing on the similarity of claims. *Dujanovic v. MortgageAmerica, Inc.*, 185 F.R.D. 660, 667 (N.D. Ala. 1999). A standard, uniform course of conduct that affects class members is generally all that is required to establish commonality. *Id.* "[T]here must be a nexus between the class representative's claims . . . and the common questions of fact or law which united the class. A sufficient nexus is established if the claims or defenses of the class and the class representative arise from the same event or pattern or practice and are based on the same legal theory. Typicality, however, does not require identical claims." *In re Healthsouth Corporation Securities Litigation*, 257 F.R.D. 260, 275 (N.D. Ala. 2009)(*quoting Kornberg v. Carnival Cruise Lines, Inc.*, 741 F.2d 1332, 1337 (11th Cir. 1984), *cert. denied*, 470 U.S. 2004 (1985). The key is "whether the proposed class representatives' claims have the same essential characteristics as those of the proposed class." *Id.* Here, the claims of the Plaintiff and the settlement class members arise from the same events – application for employment at Cook's.

4. Adequacy of Representation

Plaintiff must also show, pursuant to Rule 23(a)(4), that he, as the representative party, will fairly and adequately represent the interests of the class. Adequacy involves a determination whether there are any substantial conflicts of interest between the representatives and the class members, and whether the representatives will adequately prosecute the case. *Healthsouth*, 257 F.R.D. at 275. A class representative need not be intimately familiar with every fact or legal argument in a case. *Morris v. Transouth*

Financial Corporation, 175 F.R.D. 694, 698 (M.D. Ala. 1997). Nor are the finances of the class representatives "particularly important." *Id.*, *citing Deposit Guaranty Nat'l Bank v. Roper*, 445 U.S. 326 (1980). A plaintiff of limited means can be a class representative in a major class action. *Id.*

In this case, the named Plaintiff has no conflicts of interests that will arise, as he has the same interests as the class members and has vigorously prosecuted the action on behalf of the class. (Fisher Decl., ¶ 20). He has demonstrated a desire to protect the interests of the class members and has taken an active role in the litigation. (Fisher Decl., ¶ 20). The Plaintiff's attorneys have extensive experience as litigators and specialize in complex litigation in the federal courts, including class actions and multi-party cases. (Fisher Decl., ¶ 21; Campbell Decl., ¶2; Hill Decl., ¶2). Based on the foregoing factors, the putative settlement class should be certified.

II. The Settlement Meets the Standards for Approval Under Rule 23

This Court should approval this class settlement under Rule 23(e) because the settlement is fair, reasonable and adequate. In order to approve a class action settlement, the court "must find that it is fair, adequate and reasonable and is not the product of collusion between the parties." *Bennett v. Behring Crop.*, 737 F.2d 982, 986 (11th Cir. 1984) (citing *Cotton v. Hinton*, 559 F.2d 1326, 1330 (5th Cir. 1977). "Determining the fairness of the settlement is left to the sound discretion of the trial court," and will not be overturned "absent a clear showing of abuse of that discretion." *Id.* In *Bennett*, the Eleventh Circuit identified the factors to consider in determining whether a settlement is fair, adequate and reasonable: "(1) the likelihood of success at trial; (2) the range of possible recovery; (3) the point on or below the range of possible recovery at which a settlement is

fair, adequate and reasonable; (4) the complexity, expense and duration of litigation; (5) the substance and amount of opposition to the settlement; and (6) the stage of proceedings at which the settlement was achieved." *Id.* "The Court may also consider the judgment of experienced counsel." *Smith*, 2010 U.S. Dist. LEXIS 67832, at *6. Here, the settlement is fair, adequate and reasonable, and resulted from arm's length negotiations between experienced counsel following extensive discovery.

A. The Likelihood of Success At Trial.

The settlement is fair, reasonable and adequate when weighed against the likelihood of success at trial. While Plaintiff's counsel believe that they would have prevailed on any dispositive motions, there is always significant risk in continuing litigation. (Fisher Decl., ¶ 25). The Defendant is represented by experienced and competent counsel who have raised legal and factual issues which, if successful by motion, at trial, or on appeal, could substantially reduce or completely eliminate a potential recovery for the settlement class. (Fisher Decl., ¶ 25).

The ability to predict a likely result in cases like this one is virtually impossible. (Hopkins Decl., p. 31). Counsel for plaintiffs cannot speculate as to what facts Cook's may be able to present, how trial and appellate courts will react, or the cost and duration of the litigation. (Hopkins Decl., p. 31). Setting a budget and predicting the range of potential outcomes is extremely difficult and unreliable. (Hopkins Decl., p. 31). Therefore, taking on a case like this one involves "extraordinary risk of a degree that may be unparalleled in employment litigation." (Hopkins Decl., p. 31). As the declaration of Professor Harry L. Hopkins, long-time attorney in the area of labor and employment litigation, explains:

The additional burden for plaintiff lawyers evaluating cases is that the

> information necessary to evaluate a disparate impact or pattern and practice claim for a group of incumbent employees is tilted in favor of employers. Incumbent employees lack the "big picture" or information necessary to understand the employer's internal decision making process. However, when the prospective class involves a class of unsuccessful applicants who by definition have almost no credible information about an employer, the ability to evaluate a case is as daunting, difficult, and risky as any claims known in the law. And as employers have changed their culture over the decades, and discriminatory practices have become more opaque, the risks associated with being able to evaluate the potential for success in cases has become more difficult, not less.

(Hopkins Decl., ¶ 11).

B. The Range of Possible Recovery and the Point on or below the Range of Possibly Recovery at Which a Settlement Is Fair, Adequate and Reasonable.

The range of possible recovery weighs heavily in favor of concluding that the settlement is fair, adequate and reasonable. While the anticipated damages of the settlement class could possibly exceed the amount provided in the settlement, there is no guarantee that Plaintiff or the class would obtain any judgment at trial against Cook's. (Fisher Decl., ¶ 26).

C. The Complexity, Expense and Duration of Litigation.

The complexity, expense and duration of further litigation weigh heavily in favor of concluding that the settlement is fair, adequate and reasonable. This is a complex case involving a multitude of legal issues, most of which have not yet been fully litigated and adjudicated, including, but not limited to, the viability of claims asserted against the defendant. (Fisher Decl., ¶ 27). Continuing the litigation will also continue the expenses for both sides, likely reducing the net amounts potentially available for recovery by the settlement class. (Fisher Decl., ¶ 27).

The law relating to employment class actions has been in a constant state of flux

since 1964. *See Walmart Stores, Inc. v. Dukes*, 131 S.Ct. 2541 (2011). Furthermore,

> There have also been relatively frequent Congressional Acts that have reversed Supreme Court rulings regarding employment class actions which have made learning the law in this area both stimulating and frustrating for practitioners and a barrier to entry into the legal marketplace for litigating these claims for new lawyers - especially those who are not compensated as services are rendered (i.e., the plaintiff's bar).

(Hopkins Decl., ¶ 15).

The acceptance of representation of the Plaintiff in a race discrimination case also has a very negative effect on the financial health of a law firm because of the delay in the payment of fees and expenses in successful cases and the non-payment of fees and expenses in unsuccessful cases. Both of these factors present a necessary and inherent part of the representation of plaintiffs for all firms who accept such cases. The delay in payment often lasts from 2-5 years or longer, as in this case. (Fisher Decl., ¶ 28).

D. The Stage of Proceedings at Which the Settlement Was Achieved.

The settlement was achieved after completion of extensive discovery, including taking the depositions of key witnesses as well as reviewing thousands of pages of documents relating to the claims and defenses at issue in the case. (Fisher Decl., ¶ 29). At this stage in the proceedings, the legal and factual issues are well known to both sides and to the Court. This is not a situation in which a settlement is quickly proposed when the facts relating to liability or damages are unclear or undiscovered. Litigation in this case was in its fifth year. However, as discussed above, the litigation is still at an early enough stage in the proceedings such that a settlement now would avoid the substantial expense involved with continued litigation, as well as the risk of adverse rulings on many important issues that have not yet been litigated.

E. The Judgment of Experienced Counsel.

Class Counsel in this case are experienced in successfully handling complex class action employment cases. (Fisher Decl., ¶ 30). Class Counsel have completed substantial discovery in this case and carefully evaluated the strengths and weaknesses of our theories and evidence, and believe that the settlement is in the best interests of the settlement class. (Fisher Decl., ¶30). While Class Counsel remain confident that the class members could obtain a significant judgment in the event the case proceeds to trial, Counsel also believe that a settlement at this point in litigation is in the best interests of the settlement class. (Fisher Decl., ¶30).

All of these factors being met, the settlement proposed here is fair, reasonable and adequate, and should be approved by the Court.

III. This Court Should Approve the Class Representative Service Award to the Representative Plaintiff, Marion Waters

The Settlement Agreement calls for the named Plaintiff, Marion Waters, to receive a Service Award for participation in the action and his service to the settlement class. It has been agreed that the Service Award will be paid from the Settlement Fund, and will be one and one-half times the maximum amount paid to a settlement class member.

Incentive awards are not uncommon in class action litigation where, as here, a common fund has been created for the benefit of the class. Incentive awards compensate named plaintiffs for the services they provided and the risks they incurred during the course of the class action litigation. *Allapattah Servs. v. Exxon Corp.*, 454 F. Supp. 2d 1185, 1218 (S.D. Fla. 2006)(citing *In re Southern Ohio Corr. Facility*, 175 F.R.D. 270, 272-76 (S.D. Ohio 1997)). Incentive awards serve an important function, particularly where the named

plaintiffs participated actively in the litigation. *Id.* (citing *Denney v. Jenkens & Gilchrist*, 230 F.R.D. 317, 355, 2005 WL 388562, at *31 (S.D. N.Y. Feb. 18, 2005)).

While the Eleventh Circuit has not expressly set forth guidelines for courts to use in determining incentive awards, there is ample precedent for awarding incentive compensation to class representatives at the conclusion of a successful class action. In fact, "'[c]ourts routinely approve incentive awards to compensate named plaintiffs for the services they provided and the risks they incurred during the course of the class action litigation.'" *Ingram v. Coca-Cola Co.*, 200 F.R.D. 685, 694 (N.D. Ga. 2001).

Waters initially consulted with Sam Hill, who suggested that an attorney with experience and familiarity with Cook's and employment testing and hiring class action cases should be consulted. (Waters Decl., ¶ 12). Waters consulted with Tom Campbell, who informed him that the complexity and long duration of the case would require association of a larger firm with extensive experience in these cases. (Waters Decl., ¶ 13). Subsequently, the firm of Wiggins, Childs, Quinn & Pantazis, joined in the representation of the class. (Waters Decl., ¶ 13). Waters determination to find the best representation for his interest and the interests of the class is clearly evident.

Although the discovery process in this case was long, Waters kept up with the progress of the case and assisted Class Counsel in preparing for depositions and discussing strategies. (Waters Decl., ¶ 17-18). Waters also participated directly in the formal mediation sessions, with his sole objective being "to make sure that the class received the best possible outcome." (Waters Decl., ¶ 19, 21). Waters also attended the preliminary approval hearing. (Waters Decl., ¶ 23). As Waters stated in his declaration, attached hereto:

> I have taken time away from both work and personal obligations, held myself up to public scrutiny and ridicule and forever associated my name and reputation with a cause I believed, but which has exposed me to potential risks and scorn in some quarters of the community.

(Waters Decl., ¶ 23). Nevertheless, Waters invested substantial time and effort working with the attorneys on obtaining a successful resolution of this case. As Professor Hopkins indicates in his declaration:

> The incentive fee proposed for the named class representative who has stuck with a case for five years and withstood attack by Cook's regarding his adequacy is fair and reasonable. It is in-line or toward the low-end of typical awards in such cases. It is certainly not an amount that should infer bias or self-dealing but is more likely to reflect the probable value of his individual claim that he was clearly intent on pursuing.

(Hopkins Decl., p. 26). Based on the foregoing, the Incentive Award should be approved.

IV. The Requested Award of Attorneys' Fees Is Reasonable and Warranted

It is well established that "a lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorney's fee from the fund as a whole." *Boeing Co. v. Ban Gemert*, 44 U.S. 472, 478 (1980). "The doctrine rests on the perception that persons who obtain the benefit of a lawsuit without contributing to its cost are unjustly enriched at the successful litigant's expense." Id. As the Eleventh Circuit has held, under the "common benefit" doctrine, when litigation confers substantial benefits on members of a class, courts are authorized to award attorney's fees to class counsel to spread the cost proportionally among the class members. *Camden I Cond. Ass'n, Inc. v. Dunkle*, 946 F.2d 768, 771 (11th Cir. 1991).

Class Counsel's fee award should be based on a percentage of the common fund. (Hopkins Decl., p. 30)("Class Counsel's fee award should be based on a percentage of the common fund rather than consuming resources parsing time entries and hourly rates.").

In this circuit, the law is clear that where a settlement provides for the creation of a common fund, "attorneys' fees awarded from a common fund shall be based upon a reasonable percentage of the fund established for the benefit of the class." Id. at 774. This district has likewise held that a percentage-based fee award accomplishes the following objectives:

> First, it is consistent with the private market place where contingent fee attorneys are regularly compensated on a percentage of recovery method. Second, it provides a strong incentive to plaintiffs' counsel to obtain the maximum possible recovery in the shortest time possible under the circumstances. Finally, the percentage approach reduces the burden of the Court to review and calculate individual attorney hours and rates and expedites getting the appropriate relief to class members.

Garst v. Franklin Life Ins. Co., 1999 U.S. Dist. LEXIS 22666 at *83-84 (N.D. Ala. June 25, 1999); See *Dikeman v. Progressive Express Ins. Co.*, 312 Fed. Appx. 168, 172 (11th Cir. Fla. 2008)(district court is not limited to applying a lodestar analysis for a statutory fee-shifting award because the suits were resolved by a class settlement agreement without any express finding as to defendant's willful noncompliance).

A. The requested fee of 35% of the common fund is within the range considered reasonable and fair in the Eleventh Circuit

The Eleventh Circuit has consistently held that "there is no hard and fast rule mandating a certain percentage of a common fund which may be awarded as a fee because the amount of any fee must be determined upon the facts of each case." *Camden I*, 946 F.2d at 771. In this circuit, the majority of common fund fee awards fall between 20% and the "upper limit of 50% of the fund." *Id.* at 774-75; *In re Sunbeam; Securities Litigation*, 176 F.Supp.2d 1323, 1333 (S.D. Fla. 2001)(the 25% "bench mark" is just that; it is not a ceiling or a floor).

Class Counsel here are requesting a 35% fee, which "represents a good balance between competing interests in this highly specialized area." (Hopkins Decl., ¶ 22)(This figure would not be viewed as a windfall to the Plaintiffs' attorneys). As Class Counsel will demonstrate, this requested percentage is fair and reasonable when analyzed under the *Camden I/Johnson* factors.

The *Johnson* factors are also considered by the court in determining the reasonable percentage of a common fund to award class-action counsel. *Id*. (citing factors from *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717-19 (5th Cir. 1974)). These factors include: (1) the time and labor required; (2) the novelty and the difficulty of the questions presented; (3) the skill requisite to perform the legal service properly; (4) the preclusion of other employment by the attorney due to the acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or the circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability of the attorneys; (10) the "undesirability" of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases. *Id*. A consideration of the relevant factors in this case supports the 30% fee award requested by Class Counsel in this case.

1. The Time and Labor Required

The amount of time and labor required to achieve a result is an important consideration when considering a fee application. *See, e.g., Garst*, 1999 U.S. Dist. LEXIS 22666 at *88 (finding plaintiffs' fee request reasonable where counsel had expended thousands of hours on a contingency basis); *Carnegie v. Mut. Sav. Life Ins. Co.*, 2004 LEXIS 29404 at *137-38 (N.D. Ala. Nov. 23, 2004)(recognizing that complex civil litigation

is particularly demanding on attorneys' time and "where a plaintiff has obtained an excellent result, his attorney should recover a fully compensatory fee")(quoting *Hensley v. Eckerhart*, 461 U.S. 424, 435-36 (1983).

Here, Class Counsel dedicated substantial time and effort during the five years since this litigation started. (Fisher Decl., ¶ 32). Extensive time and energy was spent in motions practice; discovery, including several lengthy document inspections and review of thousands of employment applications; and in a protracted mediation period involving both formal and informal mediation sessions and conferences. That lasted for nearly a year. (Fisher Decl., ¶ 32). Class Counsel was dedicated to this case, and diligently pursued the class' claims in litigation and extensive settlement efforts, notwithstanding the risk of non-payment presented in this case. (Fisher Decl., ¶ 26). These efforts were the necessary groundwork for the Settlement finally obtained in this case. (Fisher Decl., ¶ 26). Thus the first Johnson factor, the time and labor required, supports the requested fee award in this case.

In this case, Class Counsel are requesting 35% of the common fund, which equals only $875,000.00 in fees. If the hours expended by Class Counsel were billed on a "straight" hourly basis, the lodestar figure would be approximately $1,076,140.00. On a firm-by-firm basis, the lodestar calculations are as follows:

FIRM	HOURS	LODESTAR
Wiggins, Childs, Quinn & Pantazis, LLC Attorneys (Samuel Fisher, Robert Wiggins, Robert Childs, and Toni J. Braxton; James V. Doyle)	1,128.00	$525,468.75
The Campbell Law Group Attorneys (Tom Campbell and Ray Bronner) Professionals Total	*1,047.15* *241.15* 1,288.30	*495, 660.25* *33,761.00* $529,421.25
The Law Offices of Samuel Hill, LLC Attorneys (Sam Hill)	50.00	$21,250.00
TOTAL	2,466.30	$1,076,140.00

These lodestar figures are based upon the given firm's current billing rates and contemporaneous time records. (Fisher Decl., ¶ 34; Campbell Decl., ¶ 22; Hill Decl., ¶11). An average of $530 for associates and $900 for senior partners is billed at the AmLaw 100 law firms. (Campbell Decl., ¶ 23, Ex. D).

Counsel here expended in the neighborhood of 2,200 hours. Hopkins Decl., ¶30). However, if not for the vast experience of the lawyers in the case many more hours would have been spent getting up to speed on the law and potential litigation strategies and tactics. (Hopkins Decl., p. 30).

Although there are three separate law firms representing Class Counsel in this case, there was no duplication of efforts among the firms. (Fisher Decl., ¶ 11). Each firm had a distinct role in the prosecution of this case. (Fisher Decl., ¶ 11). The Hill Turner firm was the initial firm contacted by Plaintiff Marion Waters. (Fisher Decl., ¶ 11). Sam Hill maintained a close relationship with the client throughout the entire litigation process. (Fisher Decl., ¶ 11). Hill Turner worked early on to put together the litigation team and to

explore the feasability of seeking class-wide and company-wide relief, based on the claims that emerged from preliminary investigation of Cook's hiring practices. (Hill Decl., ¶4; Fisher Decl., ¶ 39). Sam Hill engaged Tom Campbell and his firm and they ultimately presented the case to WCQP. ((Hill Decl., ¶4, 6; Fisher Decl., ¶ 11).

After the preliminary stages, Hill Turner played only an intermittent role in the actual litigation. (Fisher Decl., ¶ 12). However, Campbell Law, PC worked intensively during the early stages of litigation, drafting the complaint and early discovery, responding to motions to dismiss and attending hearings. Campbell continued to maintain a key role throughout the prosecution of this case. (Fisher Decl., ¶ 12).

WCQP became involved in the case in the early stages, but initially played a relatively subordinate role, mostly monitoring and consulting. (Fisher Decl., ¶ 13). As litigation progressed and moved into the more intensive discovery stage, WCQP began to play a more primary role. (Fisher Decl., ¶ 13). WCQP's role included gathering employment data to be analyzed, employing the expert consultants and working very closely with them to develop the statistical evidence on disparate impact. (Fisher Decl., ¶ 13). WCQP, LLC also played a key role in mediation and settlement. (Fisher Decl., ¶ 13).[2]

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[2]Furthermore, there was no duplication in work among the lawyers at WCQP, LLC who were involved in this case. (Fisher Decl., ¶ 35). Each lawyer played a significant, but identifiable role in this case. (Fisher Decl., ¶ 35). Samuel Fisher was the initial point of contact for the firm and played a lead role throughout the course of the firms involvement in the case; from early investigation through mediation and settlement. (Fisher Decl., ¶ 35). Toni Braxton played the important role of drafting pleadings, responding to motions, and keeping the case progressing toward resolution. (Fisher Decl., ¶ 42). James V. Doyle, along with Ms. Braxton also participated in the necessary and time consuming task of document review and data compilation. (Fisher Decl., ¶ 35). Robert Wiggins played an early consulting role, assessing the strengths of the case and making recommendations about its direction. (Fisher Decl., ¶ 36). Robert Childs became involved in the case at the mediation stage and worked closely through

2. The Novelty and Difficulty of the Questions Presented

One of the factual issues in this case involved evidence of racial coding of applications. Cases involving "coding" are rare and have not been discussed among the employment bar except in one other case since the 1970's. (Hopkins Decl., ¶ 18). This case also involved evidence that Cook's did not maintain applicant flow data, as required by the EEOC Uniform Guidelines. (Hopkins Decl., ¶ 18). Cases involving those facts are likewise rare. (Hopkins Depo., ¶ 18). "There are one or two generations of lawyers with significant experience in this narrow sub-specialty of employment law who have never seen issues raised in this litigation." (Hopkins Decl., ¶ 18). The number of lawyers competent to handle these difficult cases is dwindling. (Hopkins Decl., ¶ 19).

Furthermore, Cook's was represented by attorneys with many years of litigation and trial experience, and had virtually unlimited resources with which to prepare and present their defenses. In fact, in the past decade, there have been a mere handful of defense firms in Alabama with the requisite experience to handle these kinds of cases from evaluation through trial or settlement. (Hopkins Decl., ¶ 21). Two of the defense firms are representing Cook's in this case. (Hopkins Decl., ¶ 21).

The complexity and uncertainty in the law, combined with the vigorous defense at every stage of the case, presented novel and difficult questions which were successfully navigated by Class Counsel. Thus, the second Johnson factor supports the fee award requested.

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settlement. (Fisher Decl., ¶ 36).

3. The Skill Requisite to Perform the Legal Service Properly

The representation of employees and job applicants in cases alleging employment discrimination requires a high degree of skill and experience not readily found among members of the bar in a typical local market. There are a myriad of legal decisions and judgments that have to occur in order to successfully litigate these claims, not the least of which involves the determinations of which theories of liability should be pursued under which statutory basis.

It takes many hundreds of hours of study and substantial practical experience for a lawyer to become competent to serve as a first or second chair strategist on a disparate impact case that potentially involves challenges to facially neutral job criteria. (Hopkins Decl, ¶ 16). A lawyer who lacks this experience could not effectively screen the case for worthiness, plead it effectively, or strategize how to posture it for litigation. (Hopkins Decl, ¶ 16). As Professor Hopkins has explained:

> For all of the foregoing reasons and many more, there have never been many lawyers or law firms competent, willing and able to undertake employment discrimination class action cases - and this is especially true for hiring class actions. Nationally there are maybe a dozen or so firms scattered across the country in the larger metropolitan areas that handle such cases effectively. Those firms tend to concentrate on cases involving many thousands of job openings for large organizations (including government agencies) and private employers. While some of those firms may get involved in a case the size of the Cook's matter, many would not, especially if there were potential issues raised about the suitability of the class representative such as Cook's was initially asserting in this litigation.

(Hopkins Decl., ¶ 17). In this case, Class Counsel were uniquely qualified in this important sub-specialty, and took on a contingent fee case "of the most extreme difficulty known to this highly specialized area of the law." (Hopkins Decl., p. 17). This factor has been met.

4. The Preclusion of other employment by the attorneys due to acceptance of the case

This factor requires consideration of whether "once the employment is undertaken the attorney is not free to use the time spent on the client's behalf for other purposes." *Johnson*, 488 F.2d at 718. As reflected by the sheer number of hours devoted by the attorneys and paralegals involved in prosecuting this case, many people devoted a substantial amount of their total available time to this litigation at the preclusion of other work. Thus, the fourth *Johnson* factor supports the fee award requested.

Furthermore, representation of plaintiffs in cases like this one often leads to conflicts of interest which prevent the plaintiff's attorney from being able to represent corporate defendants who would provide non-contingent employment on a continuing basis. The law firm which represents plaintiffs must weigh the value of the representation of an individual plaintiff in a single lawsuit that is not likely to lead to further representation for that client against the possible loss of repeat business over the course of an entire career from a corporate client. Most, if not all, of the firms in the local markets who seek corporate representation refuse to accept contingent representation of plaintiffs because of the conflicts of interest that such cases cause and because of the effect on their reputation in the local markets which could cause some corporate or potential clients not to choose them as their attorney. This is part of the risk involved in the representation of plaintiffs, i.e., the risk of losing is a definite deterrent to the ability to attract competent counsel in the local markets. Our firm has been faced with this conflict in significant matters in the past.

Secondly, the requirement that fee requests be reviewed by your opponent and approved by the Court or an arbitrator is an extremely undesirable feature of such cases

even when successful. This factor, standing alone, is a deterrent to many attorneys willing to handle such cases. Regardless of the cause of such reductions, the result is a deterrent to accepting contingent representation in employment discrimination cases.

5. The customary fee

The "customary fee" in a class action lawsuit is contingent. *Ressler v. Jacobson*, 149 F.R.D. 651, 654 (M.D. Fla. 1992). This is because, an individual would rarely possess a sufficiently large stake in the litigation to justify paying his attorneys on an hourly basis. *Id*. This is particularly true in employment discrimination cases where the plaintiff is most often terminated or denied employment. For example, WCQP customarily enters into contingent fee agreements allowing for recovery of 33% in low risk cases with uncontested or moderately contested liability, and up to 49% in higher risk cases with difficult liability issues. (Fisher Decl., ¶ 43). The fee percentage requested in this case is at the low end of that range. (Fisher Decl., ¶ 43). Again, the majority of common fund fee awards in this circuit fall between 20% and 50% of the fund. *Camden I*, 946 F.2d at 771. As such, Class Counsel's request for a 35% fee is reasonable.

6. Whether the fee is fixed or contingent

Class Counsel accepted this matter on a wholly contingent basis. Courts uniformly hold that when recovery is contingent, a higher fee should be awarded than when counsel undertake no risk of non-payment. *See, e.g., Blum v. Stenson*, 465 U.S. 886, 902 (1984)("the risk of not prevailing, and therefore the risk of not recovering any attorney's fees, is a proper basis on which a district court may award an upward adjustment to an otherwise compensatory fee"); *Behrens v. Wometco Enter., Inc.*, 118 F.R.D. 534, 548 (S.D. Fla. 1998), *aff'd*, 899 F.2d 21 (11th Cir. 2001)("A contingency fee arrangement often justifies

an increase in the award of attorneys' fees"); *Jones v. Diamond*, 636 F.2d 1364, 1382 (5th Cir. 1981)("Lawyers who are to be compensated only in the even of victory expect and are entitled to be paid more when successful than those who are assured of compensation regardless of result").

This is also true because there is substantial risk that, after investing thousands of hours, plaintiff's counsel may receive no compensation whatsoever. *Ressler,* 149 F.R.D. at 655-656. Employment law plaintiff's firms know from experience that, despite the most vigorous and competent efforts, their success in contingent litigation such as this is never guaranteed. Indeed, because the fee in this matter was entirely contingent, the only certainties were that the case would require a substantial investment of time and resources over several years, and that there would be no fee without a successful result. The contingent nature of Class Counsel's representation supports the fee award requested.

7. Time limitations imposed by the client or the circumstances

Although Class Counsel were limited by the court-imposed deadlines relating to dispositive motions and discovery, they are unaware of any particular time limitations imposed by the client which would affect the fee determination in this matter.

8. The amount involved and the results obtained

Before this lawsuit, the Class Members had no remedy for the discrimination claims asserted against Cook's. Now, the efforts of Class Counsel have resulted in a $2.5 million settlement for the Class. This result was accomplished in a complex, difficult case, which was aggressively defended, and in the face of the very real risk that the Class would fail to recover anything at all.

The monetary award for each settlement class member should be several thousand

dollars based upon the representation of the number of valid and timely claims submitted to the claims administrator thus far. (Hopkins Decl., ¶25). This monetary amount is well above average for similar cases and represents an excellent result for the claimants. (Hopkins Decl., ¶25).

9. The experience, reputation and ability of the attorneys

Class Counsel in this case come from three law firms: The Law Offices of Sam Hill, LLC, Campbell Law, P.C., Wiggins, Childs, Quinn & Pantazis, LLC ("WCQP"). All three of these firms have experience in handling complex class action cases.

Sam Hill's practice is comprised almost exclusively of civil litigation, the vast majority of which is Plaintiff's work. (Hill Decl., ¶ 2). Hill has been involved in many class action cases as class counsel, including actions against junk fax advertisers and broadcasters, insurers, and lending institutions, in both state and federal court. (Hill Decl., ¶2)(see Exhibit A to Hill's Declaration).

Tom Campbell and Ray Bronner, of Campbell Law, P.C., exclusively represent clients on a contingent fee basis, and devote most of the its resources to class, mass and complex litigation. (Campbell Decl., ¶ 6). Campbell Law, P.C. has represented corporations in employment class action, mass action and representative actions, including Searle Pharmaceuticals, Stevens Graphics, Drummond Company, Westpoint-Steven, Inc., Regions Bank, Liberty National Insurance, Alabama Federal Savings & Loan Assoc., Bridgestone-Firestone, Inc., and BellSouth Telecommunications. (Campbell Decl., ¶ 2). Campbell Law, P.C. has similar experience representing consumers. (Campbell Decl., ¶ 2). Most notably, the firm's lawyers have been involved in the trial of three cases brought chiefly under California's Unfair Competition Law ("UCL"; California Bus. & Prof. Code 17200, *et seq*.)

either through conclusion or the liability phases. (Campbell Decl., ¶ 2).

Mr. Campbell, as class counsel, also achieved meaningful results in class actions against termite companies, such as Cook's. (Campbell Decl., ¶ 3). He has achieved what may be the only "limited fund" class action settlement in the history of Alabama jurisprudence and one of a very few in the country. (Campbell Decl., ¶ 3).

Mr. Campbell received his Bachelor's Degree from the University of Alabama in 1983 and his Juris Doctor in 1988. (Campbell Decl., Ex. B). Mr. Campbell has also been voted into "Best Lawyers in America - 2011" for Commercial Litigation. (Campbell Decl., ¶ 4).

Raymond L. Bronner is an associate with the Campbell Law Group. (Campbell Decl., ¶ 5). He graduated in May 2000 from the Cumberland School of Law at Samford University. (Campbell Decl., ¶ 5). Mr. Bronner began working with Mr. Campbell in the fall of 2000 and has practiced in complex and class action litigation in court and arbitration across the country. (Campbell Decl., ¶ 5). In addition to employment law cases, Mr. Bronner has participated in prosecution of claims for injured consumers in deceptive trade practices litigation. (Campbell Decl., ¶ 5).

WCQP maintains a nationwide consumer, environmental and employment practice, having litigated cases in nearly every United States federal appellate circuit in the country. (Fisher Decl., ¶2). WCQP is one of the largest Plaintiffs-oriented law firms in Alabama and one of the largest Civil Rights firms in the country. (Fisher Decl., ¶2). WCQP has offices in Birmingham, Alabama, Deland, Florida, and Washington, D.C., with more than 34 attorneys.(Fisher Decl., ¶2).

Since its formation in 1985, the Firm has litigated cases against various major corporations throughout the United States, including Winn-Dixie Stores, Cracker Barrel

Old Country Stores, Family Dollar Stores, J.P. Morgan Chase, U.S. Pipe and Foundry Company, Pittsburg Plate Glass, Goody's, Kroger, South Central Bell, U.S. Steel Corporation, most of the Health Management Organizations, and most of the nation's major railroads. (Fisher Decl., ¶3). WCQP has also been recognized by the National Law Journal as one of the top 25 litigation firms in America. (Fisher Decl., ¶3).

Furthermore, WCQP attorneys have been appointed as members of Plaintiffs' Steering Committees in numerous federal Multi-District Litigation (MDL) cases, including *In re Managed Care Litigation* (S.D. Fla. 2000), *In Re: American General Life and Accident Insurance Company - Industrial Life Insurance Litigation* (Dist. of SC, Columbia Div., 2001), *In Re: Terrorist Attacks on September 11, 2001* (S.D. NY 2003), *In Re: Pharmacy Benefit Managers AntiTrust Litigation* (E.D. PA 2006), *In Re Tyson Foods, Inc.* (694 F.Supp.2d 1348, M.D. GA, MDL No. 1854), *In Re: Comcast Corp. Set-Top Cable Television Box Anti-Trust Litigation* (E.D. Pa. 2009), and *In Re: Cox Enterprises, Inc., Set-Top Cable Television Box Antitrust Litigation* (W.D. OK 2009); and *Avandia Marketing, Sales Practices and Products Liability Litigation,* (E.D. Pa. 2007). (Fisher Decl., ¶4).

Mr. Fisher has extensive experience in class action and complex litigation, including complex litigation. (Fisher Decl., ¶9). Mr. Fisher was Plaintiff's co-counsel in *Ingram v. Coca-Cola* (1:98-CV-3679-RWS), in the Northern District of Georgia (Atlanta), which resulted in the largest valued employment consent decree in the nation at that time. (Fisher Decl., ¶9). Mr. Fisher has also served as class counsel in several prominent class action lawsuits, including *Allen v. International Truck and Engine Corp.*, in the Southern District of Indiana (Case No. IP-02- C 0902); and *Wright v. Bellsouth* (Case No. 93-C-1530-S), in the Northern District of Alabama. (Fisher Decl., ¶9).

This was by all accounts a difficult and demanding case that presented many risks as noted above. As the results achieved under these circumstances establish, Class Counsel demonstrated a high degree of ability, skill and diligence throughout the litigation. The ninth *Johnson* factor supports the fee award requested in this case.

10. The "undesirability" of the case

In general, civil rights litigation is seen "as very undesirable because it stigmatizes the attorney as a 'civil rights lawyer' and thus tends to deter fee-paying clients, particularly high-paying commercial clients, from seeking assistance from that lawyer." *Stokes v. City of Montgomery*, 706 F.Supp. 811, 815 (M.D. Ala. 1988), *aff'd*, 891 F.2d 905 (11th Cir. 1989). Furthermore, civil rights attorneys "face hardships in their communities because of their desire to help the civil rights litigant. *See NAACP v. Button*, 371 U.S. 415, 443, 83 S.Ct. 328, 9 L.Ed.2d 405 (1963). As the *Johnson* court opined:

> Oftentimes his decision to help eradicate discrimination is not pleasantly received by the community or his contemporaries. This can have an economic impact on his practice which can be considered by the Court.

Johnson, 488 F.2d at 719. The acceptance of representation of the Plaintiff in a race discrimination case has a very negative effect on the financial health of a law firm because of the delay in the payment of fees and expenses in successful cases and the non-payment of fees and expenses in unsuccessful cases. (Fisher Decl., ¶28). Both of these facts are a necessary and inherent part of the representation of plaintiffs for all firms who accept such cases. (Fisher Decl., ¶28). The delay in payment often lasts from 2-5 years. (Fisher Decl., ¶28). In this case, the work for the Plaintiff began in 2006. Counsel with qualifications and experience necessary to properly handle complex class actions involving hiring and use of selection criteria is "a tiny specialty within the overall field" would not take cases similar to

this one without the option of a substantial enhancement being added to the court-awarded attorney fees to compensate such counsel for the considerable risk of prosecuting the case for years on a contingent fee basis. (Hill Decl., ¶7).

As discussed above, the difficulty of the questions presented in this case. By taking this case, Class Counsel took on significant risk of non-payment, the significant burden of advancing litigation expenses and the significant "opportunity cost" of having to turn down other potentially lucrative cases. (Fisher Decl., ¶44). These risks strongly motivated Class Counsel to perform work of the highest quality and in appropriate quantity, in order to fulfill their fiduciary commitment to Plaintiff and the Class and to lessen the chances of loss. (Fisher Decl., ¶44).

The complexity of the case, combined with the intensity of the defense, reflects that the case had some undesirable characteristics. The undesirability of the case is further demonstrated by the fact the noted firm Whatley, Drake and Kallas actually withdrew after Cook's attorney alleged the class representative was disqualified by virtue of a prior conviction of a crime. (Hopkins Decl., p. 19). This case was not an example of "cookie-cutter" litigation and presented unique demands. *See, e.g., Sunbeam*, 176 F.Supp.2d at 1336 (noting that counsel should be rewarded for taking on a case to which other law firms are adverse and explaining that "[s]uch aversion could be due to any number of things, including social opprobrium surrounding the parties, thorny factual circumstances, or the possible financial outcome of a case"). This fact also weighs in favor of the requested fee award.

11. The nature and length of the professional relationship with the client

Class Counsel are not aware of any particular factors concerning the nature and length of the professional relationship of counsel with his client which could affect the fee determination. Other than the five-year relationship developed as a result of the present litigation, none of Plaintiff's lawyers had a prior professional relationship with Waters.

12. Awards in similar cases

"The reasonableness of a fee may also be considered in light of awards made in similar litigation within and without the court's circuit." *Johnson*, 488 F.2d at 719. Again, the majority of common fund fee awards in this circuit fall between 20% and 50% of the fund. *Camden I*, 946 F.2d at 771. The requested fee in this case falls squarely within that range. Furthermore, the ability to predict a likely result in cases like this one is virtually impossible. (Hopkins Decl., ¶31). Therefore, a comparison of attorneys fee awards in other cases is not helpful, as the facts are always unique.

B. Other factors

In addition to the *Johnson* factors, the Eleventh Circuit has identified the following factors that a court may consider in approving a fee request: (1) the time required to reach settlement; (2) whether there are any substantial objections by class members other parties to the settlement terms or the fees requested by counsel; (3) any non-monetary benefits conferred upon the class by the settlement; and (4) the economics involved in prosecuting a class action. *Camden I*, 946 F.2d at 775. Each of these factors support the requested fee award in this case as well.

1. Time required to reach settlement

While all parties expressed willingness to reach an early settlement, the negotiations proved difficult and protracted. (Fisher Decl., ¶14). Mediation efforts began in late summer/early fall 2010. (Fisher Decl., ¶14). This case required specialized knowledge of not only Title VII, but also, disparate impact claims, testing claims, statistical models and regression analysis, and class action litigation concerns. (Fisher Decl., ¶14). Therefore, it was necessary to find a mediator with sufficient knowledge and experience in these matters. (Fisher Decl., ¶14). After weeks of screening potential mediators and negotiations between the parties, Hunter Hughes was selected as mediator. (Fisher Decl., ¶14).

Hunter Hughes is a nationally-known attorney and mediator with the firm, Rogers & Hardin in Atlanta, Georgia. (Fisher Decl., ¶15). Mr. Hughes as successfully served as lead trial counsel in numerous employment cases, including nationwide class actions and mass employment litigation. (Fisher Decl., ¶15). He has also successfully mediated numerous employment class actions, including the Wal-Mart and Publix class actions, Home Depot and *Ingram v. Coca-Cola Company*, and other cases of national prominence. (Fisher Decl., ¶15).

The parties in this case participated in their first mediation session on December 20, 2010. (Fisher Decl., ¶16). During this session, the parties developed a plan of action to gather information necessary for both sides to evaluate the scope and size of the class and to assess the value of potential claims. (Fisher Decl., ¶16). The parties understood and agreed that additional discovery was needed in order to perform statistical analyses. (Fisher Decl., ¶16). Plaintiff subsequently employed out-of-state experts to analyze the data provided by Cook's. (Fisher Decl., ¶16).

The mediation process continued for months, with at least four informal conferences held prior to a second formal mediation session conducted on July 25, 2011. (Fisher Decl., ¶17). Following the second formal session, the parties, with the help of Mr. Hughes, agreed upon and drafted the terms of the settlement agreement. (Fisher Decl., ¶17). This process resulted in at least five additional informal conferences spanning over several weeks. (Fisher Decl., ¶17). Counsel for the parties were determined to ensure that the parties' interests were advanced and protected. (Fisher Decl., ¶17). This factor weighs in favor of the requested fee award. *See, e.g. Ressler*, 149 F.R.D. at 656 (noting that counsel had shown particular diligence and care in maintaining settlement deliberations over 9-10 month period).

2. Whether there are any objections by class members or other parties to the settlement terms or fees requested by counsel

Again, this settlement has met with overwhelming approval by the settlement class members. (Fisher Decl., ¶24). As of the April 12, 2012 deadline for objections, 297 putative settlement class members have submitted claim forms, and no settlement class member has objected or opted out. (Fisher Decl., ¶24). Thus, 100% of the settlement class has either actively or passively accepted the benefits of the settlement.

3. Any non-monetary benefits conferred on the class

Along with the monetary benefit of $2.5 million dollars, the Settlement provides the Settlement class with non-monetary benefits as well. These specific benefits are outlined in the Summary of Settlement Terms included above. In addition to evaluating non-monetary aspects of a settlement that benefit the Class directly, in evaluating a fee request, courts frequently consider the broad "public" benefits of a case. *Ressler*, 149 F.R.D. at 657

("Attorneys who bring class actions are acting as 'private attorneys general' and . . . [a]ccordingly, public policy favors the granting of counsel fees sufficient to reward counsel for bringing these actions and to encourage them to bring additional such actions")(citation omitted).

4. The economics involved in prosecuting a class action

Few firms were equipped to deal with litigation that could endure for many years or even decades – especially on behalf of private litigants challenging public or private employers. (Hopkins Decl., ¶ 14). Law firms then and now are faced with working for many years without any compensation and where they would need to routinely employ industrial and organizational psychologists who charge some of the highest expert witness fees of any litigation support group. (Hopkins Decl., ¶ 14).

C. The requested award of expenses is reasonable and warranted

Reimbursement of reasonable costs and expenses to counsel who create a common fund is both necessary and routine. Class Counsel have advanced or incurred $53,831.55 in expenses to date, and a summary of these unreimbursed expenses by category is contained in the affidavits of counsel from each of the three Class Counsel firms. Because these expenses were advanced with no guarantee of recovery, Class Counsel had a strong incentive to keep them to a reasonable level and did so.

On a firm-by-firm and category-by-category basis, the expenses are as follows:

CATEGORY	WCQP	Campbell Law
Travel	152.03	1,749.17
Copies and Scans	1,731.90	1,100.80
Research	977.58	2,177.96
Telephone	34.72	89.00
Miscellaneous	55.20	167.64
Postage	3.15	42.68
Process Service	336.86	125.35
Filing Fees	0.00	350.00
Transcripts	2,263.55	11.70
Expert Fees	42,219.25	0.00
3rd Party Mailing	99.51	143.50
SUBTOTAL	**47,873.75**	**5,957.80**
	TOTAL	**$53,831.55**

In light of the nature of this complex litigation, which required, *inter alia*, the use of experts, multiple mediation sessions with a highly capable and respected mediator, the expenses incurred by Class Counsel were both reasonable and reasonably related to the interests of the Plaintiff and the settlement class. Hence, Class Counsel respectfully request that they be fully reimbursed for their out-of-pocket expenses in this case.

WHEREFORE, based on the reasons set forth above and those previously stated on the record, Class Counsel requests certification of the settlement class and final approval of the settlement, including the requested incentive award to the representative plaintiff. Finally, Class Counsel requests an attorneys fee award of 35% of the common settlement fund which equals $875,000.00 plus expenses in the amount of $53,831.55.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of Court by using the CM/ECF system, which will send notice of electronic filing to the following:

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On this the 10th day of May, 2012.

/s/ Toni J. Braxton
OF COUNSEL