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

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

MARION WATERS,	)	
	)	
Plaintiff,	)	
	)	**Case No.: 2:07-CV-00394-LSC**
v.	)	
	)	
COOK'S PEST CONTROL, INC.,	)	
	)	
Defendant.	)	

DEFENDANT'S BRIEF IN SUPPORT OF APPROVAL OF CLASS SETTLEMENT

INTRODUCTION

Defendant, Cook's Pest Control, Inc. submits this brief in support of final approval of the Settlement Agreement reached by the parties in the above-styled action. In his brief, Plaintiff has fairly and accurately summarized the procedural history of this litigation through mediation and settlement, as well as the terms of the Settlement Agreement. Plaintiff also has provided the Court with a succinct argument as to why the settlement class should be certified. While Cook's does not necessarily agree with all of the arguments and factual allegations in that section of Plaintiff's Brief--Cook's denies that it engaged in any discriminatory conduct, and reserves the right to contest certification in the event that settlement does not become final--Cook's agrees that the requirements for certification of a settlement

class have been met. Cook's also agrees with Plaintiff that the settlement is fair, reasonable, and adequate in all respects. Cook's therefore writes only to address issues relating to notice to the class, the status of the claims process, and compliance with the Class Action Fairness Act of 2005 ("CAFA"), 28 USC §§1332(d), 1453, 1711-1715.

NOTICE AND THE STATUS OF THE CLAIMS PROCESS

In its Order Preliminarily Approving Settlement and Providing for Notice ("Preliminary Approval Order"), the Court appointed Settlement Services, Inc. ("SSI"), of Tallahassee, Florida, as the Claims Administrator, and directed SSI to mail the approved Class Notice of the parties' settlement to all potential class members for whom Cook's had address information.[1] As reflected in the Second Declaration of Loree Kovach, ¶ 3, filed contemporaneously herewith, SSI mailed a total of 14,563 Class Notices to all such potential class members on February 27, 2012.[2] The Preliminary Approval Order further provided that with respect to any

[1] Both the mailed notice and the newspaper notice, discussed infra, notified class members of the nature of the action, the class claims, the right to enter an appearance through an attorney, the right to opt out and the time and manner for doing so, and the binding effect of a class judgment on class members, and thus fully complied with the requirements of Fed. R. Civ. P. 23(c)(2)(B)(i) - (vii). The notices also directed class members to a toll-free number they can call for additional information, and SSI set up a limited-access website with information and documents related to the case. See the Second Declaration of Loree Kovach, and the discussion at p. 5, infra.

[2] In evaluating that number, as well as response rates, it is important to bear in mind that Cook's employment applications do not reflect the race of the applicant. Therefore, notices were mailed to all known applicants during the settlement, rather than merely to African American applicants. The Class Notices mailed to applicants repeatedly stated that non-African Americans are not

Class Notice returned as undeliverable, SSI attempt a trace of the potential class member and, if it was able to establish an alternative address, remail the class notice. Consistent with the Preliminary Approval Order, SSI has remailed 2,605 notices, which had been returned as undeliverable, to trace addresses. (Id.) SSI also remailed 415 returned notices to forwarding addresses provided by the Post Office. (Id.)

SSI also placed the newspaper notice approved by the Court in the online and print versions of newspapers of general circulation in each county in which Cook's has a district office. (Id. at ¶ 4) Those notices, which ran between February 28 and March 2, 2012, appeared in 27 newspapers (of which 19 had on-line versions), in four states--Alabama, Georgia, Mississippi, and Tennessee. (Id.) Those are the only states in which Cook's does business. The settlement also received press coverage in the *Decatur Daily* and *Chattanooga Times Free Press,* and in various on-line news services and blogs. To date, SSI has received 17 claim forms from potential class members to whom no notice was mailed. (Id. at ¶ 7) As Cook's had generally preserved its applications during the settlement period, the notice by publication was included only to reach those class members whose

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included in the class and should not submit a claim form. Both the toll-free number and website set up by SSI in connection with the settlement, and the Claim Form itself, were designed to inform potential claimants that only African American applicants should submit a claim.

applications might have been inadvertently lost or destroyed, and the number of responses indicates that the newspaper notices were highly effective.

As required by the Settlement Agreement, SSI also set up a toll free, telephone number limited access website in connection with the settlement. (Id. at ¶ 5) Access to the site requires a user name and password, which can be obtained by contacting SSI on the toll-free number set forth in the notices. The website contains general information about the case, a Frequently Asked Questions section, and links to the Claim Form, Claim Form Instructions, Fair Credit Reporting Act Disclosure and Authorization Form, the Settlement Agreement, and the Class Notice, all of which can be downloaded by the viewer. (Id.) It also includes a section setting forth relevant deadlines in the case; a section regarding class member address changes; instructions for opting out or filing objections to the settlement; and contact information for SSI, Class counsel, Cook's counsel, and the Court. (Id.)[3]

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[3] There is no question that mailing direct notice to all known potential class members, and publishing notice in 27 newspapers is sufficient to meet Rule 23 (c)(2)(B)'s requirement of the "best notice practicable under the circumstances," especially when coupled with the "tracing" and re-mailing protocols observed here, the website, and the toll-free number. <u>See, e.g.</u> *In re Checking Account Overdraft Litigation*, __F. Supp. 2d__, 2011 WL 5873889 at *6-7 (S.D. Fla. 2011) (notice by direct mail to class members, notice by publication in appropriate outlets, a toll-free number and a settlement website constituted "the best notice practicable"); *Weinberger v. Kendrick,* 698 F.2d 61, 69-71 (2d Cir. 1982) (approving of mailed notice and publication in one newspaper); *In re Prudential Securities Inc. Ltd. Partnerships Litigation.,* 164 F.R.D. 362, 367 (S.D.N.Y.) (approving of mailed notice to class members identified with "reasonable effort" and publication in various newspapers), *aff'd,* 107 F.3d 3 (2d Cir. 1996). *See also Weinberger v. Kendrick,* 698 F.2d 61, 71 (2d Cir. 1982) (rejecting contention that mailing of notice to last known address of all class members was inadequate).

As of May 8, 2012, SSI had fielded approximately 908 calls on the toll-free number regarding the proposed settlement, and has given out about 272 user names and passwords to the website. (Id. at ¶ 6) SSI has mailed out approximately 558 claim form packets in response to requests received on the toll-free number, and numerous other potential class members have downloaded claim forms from the website. (Id.)

As of May 8, 2012, SSI has received approximately 355 claim forms, with twenty days remaining in the claims period. (Id. at ¶ 7) Some of those claims may be denied for various reasons--for example, five claimants had no high school diploma or GED, seven failed to submit an executed FCRA form, seventeen had been convicted of a felony, and one both lacked a driver's license and had been convicted of a felony.[4] (Id.) Additionally, there are a few applications with incomplete or ambiguous information with respect to which validity determination will have to be made.[5] (Id.) However, the vast majority of the claim forms appear to be valid. Recovery amounts, of course, will vary depending on the number of claims, the formula set forth in the Settlement Agreement, and the fees and

[4] Pursuant to Section VII (C)(2)(a) (p. 14) of the Settlement Agreement, an applicant must have graduated from high school or obtained a GED, possessed a valid driver's license and not been convicted of a felony in order to be eligible to receive an award.

[5] Section VII (C)(2)(b) and (c) require that a claim form be complete in order to be valid, and Section VII (C)(3) provides that the Claims Administrator shall make final determinations regarding the sufficiency or validity of a claim.

expenses awarded to class counsel, but even if the number of valid claims were to double, there still would be thousands of dollars in the settlements fund to satisfy each claim. If there is any amount remaining in the Settlement Fund after all claims are paid, it will be paid to a charity, the Birmingham Chapter of the United Negro College Fund.

Objections to the settlement, and opt-out notices, were due to be received by April 12, 2012. Significantly, not a single class member opted out of the settlement, or filed an objection to it. (Id. at p. 2) "In determining whether a settlement is fair, adequate, and reasonable, the obvious first place the court should look is to the views of the class itself." *Paradise v. Wells,* 686 F.Supp. 1442, 1444 (M.D. Ala. 1988). See also *Hill v. Art Rice Realty Co.*, 66 F.R.D. 449, 456 (N.D. Ala. 1974) ("In considering the fairness of the settlement, the attitude of the people whose interest shall be affected should of course, be taken into consideration.") A small number of objections and opt-outs weighs heavily in favor of a finding that a settlement is fair, reasonable, and adequate. In *Hill, supra*, the Court stated as follows:

> That there is only one objection is compelling evidence that the attitude of the overwhelming percentage of the class effected [sic] by the settlement does not oppose the settlement. The attitude of the class thus supports the reasonableness and appropriateness of the proposed settlement.

66 F.R.D. at 456. Similarly, in *Beavers v. American Cast Iron Pipe Co.*, 164 F.2d 1290 (N.D. Ala. 2001), the court stated:

> *There was only one objection to the present settlement. Thus, not only did counsel for the parties and all the named plaintiffs approve the settlement, almost 100% of the class also approved the settlement.* The court finds that this is yet another factor favoring approval of the settlement.

Id. at 1298 (emphasis in original; citations omitted). See also *Carnegie v. Mutual Savings Life Ins. Co.*, 2004 WL 3715446, *22 (N.D. Ala. 2004) (No objections and 0.4% opt-outs demonstrated "that the proposed settlement is supported by the vast majority of class members, and this factor counsels in favor of approval of the settlement"); *Elkins v. Equitable Life Ins. Co. of Iowa*, 1998 WL 133741 (M.D. Fla 1998) (*De minimis* number of objections weighed in favor of approval of the settlement). The complete absence of opposition to this settlement--not a single objection, and not a single opt-out[6]--is powerful evidence that the settlement is fair, reasonable, and adequate in all respects.[7]

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[6] The fact that there are no opt-outs is especially significant in this case, as opt-out rates typically are considerably higher in employment cases than in consumer cases. B. Rothstein and T. Willging, Managing Class Action Litigation: A Pocket Guide for Judges, at 26 (2d. ed. 2009).

[7] A lack of objections by class members also is probative of the absence of collusion in connection with a class settlement. *Carnegie, supra*, 2004 WL 3715446 at *24. However, Cook's believes that the absence of collusion is apparent on the face of the Settlement Agreement in this case, given that Class counsel's fees and expenses will be determined by the Court and that neither the named Plaintiff, Class counsel, Cook's, nor Cook's counsel has any interest in any residual remaining in the settlement fund after all awards are paid. Rather, any such residual will be paid to the Birmingham Chapter of the United Negro College Fund.

CAFA Compliance

The Class Action Fairness Act of 2005 ("CAFA"), 28 USC §§1332(d), 1453, and 1711 et seq., provides that in connection with settlement of a class action lawsuit in federal court, the defendant "[s]hall serve upon the appropriate State official of each State in which a class member resides and the appropriate Federal official, a notice of the proposed settlement consisting of--

> "(1) a copy of the complaint and any materials filed with the complaint and any amended complaints (except such materials shall not be required to be served if such materials are made electronically available through the Internet and such service includes notice of how to electronically access such material);
>
> "(2) notice of any scheduled judicial hearing in the class action;
>
> "(3) any proposed or final notification to class members of--
>
> "(A)(i) the members' rights to request exclusion from the class action; or
>
> "(ii) if no right to request exclusion exists, a statement that no such right exists; and
>
> "(B) a proposed settlement of a class action;
>
> "(4) any proposed or final class action settlement;
>
> "(5) any settlement or other agreement contemporaneously made between class counsel and counsel for the defendants;
>
> "(6) any final judgment or notice of dismissal;

> "(7) (A) if feasible, the names of class members who reside in each State and the estimated proportionate share of the claims of such members to the entire settlement to that State's appropriate State official; or
>
> "(B) if the provision of information under subparagraph (A) is not feasible, a reasonable estimate of the number of class members residing in each State and the estimated proportionate share of the claims of such members to the entire settlement; and
>
> "(8) any written judicial opinion relating to the materials described under subparagraphs (3) through (6).

28 USC §1715(b). The statute further provides that

> An order giving final approval of a proposed settlement may not be issued earlier than 90 days after the later of the dates on which the appropriate Federal official and the appropriate State official are served with the notice required under subsection (b).

28 USC §1715(d).

Cook's has fully complied with its obligations under CAFA in connection with the settlement before the Court. In this case, the "appropriate Federal official" clearly is U. S. Attorney General Eric Holder. See 28 USC §1715(a)(1). On February 6, 2012--well over 90 days before the May 25, 2012 Fairness Hearing and therefore well over 90 days before any possible entry of an order finally approving the Settlement Agreement--Cook's served an appropriate notice on Attorney General Holder. (Declaration of Dent Morton, ¶¶ 6-7 and Ex. B.) The notice, which stated that it was being sent pursuant to CAFA, informed him of the pendency of the lawsuit and that it is a class action asserting claims of race

discrimination against African Americans in hiring. The notice further informed Mr. Holder that the parties had reached a proposed settlement, which had been preliminarily approved by the court. It set forth the date, time, and location of the Fairness Hearing, and it stated that there were no side agreements between counsel and that no final judgment or notice of dismissal had been entered in the case. The notice also explained that notices had been sent to the "appropriate State official" in each state, as contemplated by CAFA.

The notice further explained that because Cook's applications for employment do not reflect the race of the applicant, and because there might be applicants whose identity was not reflected in Cook's records, it is not possible to determine the total number of class members, the total number of class members residing in each jurisdiction, or the proportionate share of the settlement that any class member in any state will receive. The notice also set forth the approximate percentages of known applicants living in each state and territory, and enclosed a CD listing the names of all known applicants by state. Finally, as explained therein, the notice also enclosed a CD containing copies of the Complaint and Amended Complaint, with attachments; copies (in blank) of the notice of the proposed settlement to be mailed to known applicants, and the notice being published in the various newspapers; a copy of the Settlement Agreement, and a

copy of the Court's Order Preliminarily Approving Settlement and Providing for Notice.

Also on February 6, 2012, Cook's served similar notices on the "appropriate State officials" as well. (Id. at ¶¶ 3-5 and Ex. A.) Pursuant to 28 USC §1715(a)(2) the "appropriate State official" is

> the person in the State who has the primary regulatory or supervisory responsibility with respect to the defendant, or who licenses or otherwise authorizes the defendant to conduct business in the State, if some or all of the matters alleged in the class action are subject to regulation by that person. If there is no primary regulator, supervisor, or licensing authority, or the matters alleged in the class action are not subject to regulation or supervision by that person, then the appropriate State official shall be the State attorney general.

Because Cook's had no way of knowing which states or territories were home to potential class members, and because of the difficulty of determining the identity of the "appropriate State official" in each state or territory, Cook's served notices to the Attorneys General of all fifty states and each U.S. territory, and to the entities in each state or territory responsible for regulating the pest control industry. (Id. at ¶ 3.) Those notices contained essentially the same information as the notice directed to U. S. Attorney General Holder, except that they contained information relating only to the percentage of known potential class members residing in the official's state or territory, and listed the names of only the known potential applicants residing in that state or territory.

Shortly thereafter, Cook's discovered that a few names had been left off the list of known applicants for the State of Alabama. (Id. at ¶ 8.) It therefore mailed supplemental notices to U. S. Attorney General Holder, Alabama Attorney General Luther Strange, and John McMillan, Commissioner, Alabama Department of Agricultural Industries on February 8, 2012. (Id.) The supplemental notices explained the error, included a list of the names omitted, and noted that their addition made no material change in the percentages set forth in the previous Notices.[8]

Subsequently, the Court approved changes in the Notices to be sent to known applicants, and the Notices to be published in various newspapers. On February 14, 2012--still more than 90 days before the May 25, 2012 Fairness Hearing--Cook's sent supplemental notices to U. S. Attorney General Holder, and to the state and territorial officials. (Id. at ¶ 9.) Those notices enclosed copies of the revised notices to class members approved by the Court.

In sum, Cook's has more than complied with its obligations under CAFA with respect to the settlement before the Court. Cook's served appropriate notices, and appropriate supplemental notices, to the appropriate Federal and State officials more than 90 days before any possibility of an order finally approving the

[8] As that was true for all other states and territories, no supplemental notices were sent to other "appropriate State officials."

settlement. Significantly, to date not a single official has taken any action whatsoever to oppose the settlement - once again, powerful evidence that it is fair, adequate, and reasonable.

/s/ Dent M. Morton
Mac B. Greaves ASB-6830-A60M
Dent M. Morton ASB-6431-N77D
Julie W. Pittman ASB-3628-T52J

OF COUNSEL:
BURR & FORMAN LLP
3400 Wachovia Tower
420 North 20th Street
Birmingham, Alabama 35203
Telephone: (205) 251-3000
Facsimile: (205) 458-5100

/s/ David J. Middlebrooks
David J. Middlebrooks ASB-8553-D58D
Attorneys for Defendant
Cook's Pest Control, Inc.

OF COUNSEL:
LEHR MIDDLEBROOKS
& VREELAND, P.C.
P.O. Box 11945
Birmingham, Alabama 35202

CERTIFICATE OF SERVICE

I hereby certify I have served a copy of the above and foregoing DEFENDANT'S BRIEF IN SUPPORT OF APPROVAL OF SETTLEMENT on counsel by filing the foregoing with the Clerk of the Court using the CM/EMF system on this the 10th day of May, 2012:

Thomas F. Campbell
Campbell Law
Concourse at Riverchase
100 Concourse Parkway, Suite 115
Birmingham, AL 35244

Samuel Mark Hill
The Law Office of Sam Hill, L.L.C.
2117 Magnolia Avenue South, Suite 100
Birmingham, AL 35205

Robert Childs
Samuel Fisher
Wiggins, Childs, Quinn & Pantazis, LLC
The Kress Building
301 19th Street North
Birmingham, AL 35203

/s/ Dent M. Morton
OF COUNSEL