IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
HATTIESBURG DIVISION

VERONICA COOK, YOLANDA PHELPS
CHARLYN DOZIER, AND SELEATHA MCGEE,
ON BEHALF OF THEMSELVES
AND ALL OTHERS SIMILARLY SITUATED **PLAINTIFFS**

v. **No. 2:11cv41-KS-MTP**

HOWARD INDUSTRIES, INC. **DEFENDANT**

consolidated with

VERONICA COOK, et al.
PLAINTIFFS

v. **No. 2:11cv199-KS-MTP**

HOWARD INDUSTRIES, INC. **DEFENDANT**

MEMORANDUM OPINION AND ORDER

This matter is before the Court on the Plaintiffs' Motion for Conditional Certification of the Class and for Preliminary Approval of Class Action Settlement [29]. For the reasons set forth below, the Court finds that the Motion is well taken and should be granted.

I. BACKGROUND

On February 25, 2011, Plaintiffs Veronica Cook, Yolanda Phelps, Charlyn Dozier and Seleatha McGee, individually and on behalf of those similarly situated, brought suit against Howard Industries, Inc. ("HI" or "Defendant") in this Court alleging racial discrimination in violation of Title 42 U.S.C. § 1981. (*See* Compl. [1] and 1st Am. Compl. [2] in Case No. 2:11cv41.) On September 30, 2011, these same Plaintiffs filed a separate action against HI in this Court alleging racial and national origin discrimination

in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.* ("Title VII"). (*See* Compl. [1] in Case No. 2:11cv199.) Subject matter jurisdiction in both cases is asserted under 28 U.S.C. §§ 1331 and 1343. On November 1, 2011, Plaintiffs' separate actions were consolidated for all purposes, including trial, since the same parties and common questions of law and fact exist as between the two actions. (*See* Order Consolidating Cases [20].)[1] Plaintiffs' Motion for Conditional Certification of the Class and for Preliminary Approval of Class Action Settlement [29] was filed on August 27, 2012. The Motion is unopposed by Defendant HI.

Plaintiffs and proposed class members consist of black and non-Hispanic white persons who applied for a position at HI's transformer plant in Laurel, Mississippi from January 1, 2003, to August 25, 2008, and were not hired.[2] Plaintiffs allege that HI violated 42 U.S.C. § 1981 and Title VII by discriminating against certain job applicants on the basis of race or national origin. Specifically, Plaintiffs allege that HI refused to hire non-Hispanic job applicants or considered their applications with disfavor due to their race and/or national origin. Plaintiffs allege that they suffered economic loss, humiliation, embarrassment, physical and emotional distress, and mental anguish because they were not hired by HI. Plaintiffs, for themselves and for other similarly situated applicants to HI, seek compensatory damages, punitive damages, attorney's fees, expert fees, and costs.

---

[1] Unless otherwise noted, docket entry numbers listed in this Order pertain to filings in Case No. 2:11cv41.

[2] Defendant and Plaintiffs' counsel have estimated that the proposed class totals approximately 5,000 persons.

The parties engaged in a series of settlement communications from the time the complaints were filed. In February of 2012, the parties reached a settlement in principle. Over the next seventy (70) days, the parties negotiated at arms-length the precise language and specific terms of their Stipulation and Class Action Settlement Agreement ("Settlement Agreement").[3] The Settlement Agreement is the result of extensive negotiations on the part of Plaintiffs' counsel and HI's counsel, all of whom have experience in litigating class actions involving similar claims. The relief set forth in the Settlement Agreement includes the opportunity for employment at HI or monetary compensation for "Qualified Class Members,"[4] who applied for employment at HI from January 1, 2003, to August 25, 2008.

As to the monetary relief afforded under the Settlement Agreement, HI will establish a settlement fund of one million three hundred thousand dollars ($1,300,000.00). The $1,300,000.00 will be paid by Defendant into an account to be designated by the "Claims Administrator."[5] The Claims Administrator will accept claims from purported members of the class and will determine whether those individuals are,

---

[3] The Settlement Agreement is attached to Plaintiffs' Motion [29] as Exhibit "2" (Doc. No. [29-2].)

[4] Under the Settlement Agreement, a Qualified Class Member is any Class Member that has provided the Claims Administrator with the Class Member's valid social security number and other tax information in the form required by law, completed a Verification Form, returned the Verification Form in the manner and time period set forth in the Verification Form, and for whom the Claims Administrator has verified that the information on the Verification Form is (a) accurate and (b) entitles the Class Member to payment of an Individual Benefit. (*See* Settlement Agreement [29-2] at § 1.19.)

[5] The parties have jointly selected L. Stephens Tilghman to serve as the Claims Administrator. (*See* Settlement Agreement [29-2] at § 1.4.)

in fact, class members and, if so, whether they are entitled to a payment under the terms of the Settlement Agreement. The Claims Administrator will then pay out sums from the settlement fund to Qualified Class Members under the terms of the Settlement Agreement. The Qualified Class Members will be divided by the Claims Administrator into four categories:

(a) **Category A.** Objective documentation shows Claimant applied for employment between January 1, 2003, and August 25, 2008, was qualified for employment, was not hired (or offered em ployment by HI), HI's records identify no Valid Non-Discriminatory Reason for Non-Hire, and the Claimant was hired by HI (or offered employment by HI), on or after August 25, 2008.[6]

(b) **Category B.** Objective documentation shows Claimant applied for employment with HI between January 1, 2003, and August 25, 2008, was qualified for employment, was not hired (or offered employment by HI), and HI's records identify no Valid Non-Discriminatory Reason for Non-Hire.

(c) **Category C.** Objective documentation shows Claimant applied for employment with HI between January 1, 2003, and August 25, 2008 and was not hired (or offered em ployment by HI) but does not affirmatively show that Claimant was qualified for employment.

(d) **Category D.** Named Plaintiffs in the Litigation.

(Settlement Agreement [29-2] at § 5.6.) These categories are mutually exclusive, such that a class member may only qualify for up to one payment from the settlement fund based on membership in one category. The Claims Administrator will determine a Qualified Class Member's payment from the settlement fund (according to the terms of the Settlement Agreement) based on written evidence provided by Defendant or

[6] On September 18, 2012, the Plaintiffs and Defendant submitted a Joint Notice [31], providing that a Qualified Class Member falling under "Category A" must have been hired on or after August 25, 2008, but before February 10, 2012, since February 9, 2012, is the date the parties advised the Court of a tentative settlement.

Qualified Class Members.

Defendant will also offer seventy (70) Qualified Class Members (who meet HI's established eligibility requirements for hire) a bargaining unit position[7] in Defendant's Laurel transformer plant within nine (9) months of the effective date of the settlement. The seventy Qualified Class Members will be selected by lottery from among all Qualified Class Members who apply for a bargaining unit position. Qualified Class Members who are not hired by Defendant or offered a position through the lottery process are eligible to receive their share (if any) of the monetary settlement fund.

Plaintiffs advise that prior to the fairness hearing to be conducted on the settlement, Plaintiffs' counsel will petition the Court for an award of attorney's fees and statutory costs not to exceed $457,500.00, which is 15% of the total settlement value.[8] HI has agreed not to oppose Plaintiffs' counsel's request for a fee award not to exceed this amount. Attorney's fees and costs will be paid by HI outside of the settlement fund under the terms of the Settlement Agreement.

II. DISCUSSION

Plaintiffs' unopposed Motion [29] principally seeks two forms of relief. First, Plaintiffs request that the Court certify the following class for settlement purposes only: "all black and non-Hispanic white persons who applied for a bargaining unit position at

---

[7] A list of bargaining unit positions (such as janitor, painter, shipping operator, and electrical technician) is in the record. (*See* Doc. No. [29-3].) For purposes of the Settlement Agreement, the parties have valued each position at $25,000.00. (*See* Settlement Agreement [29-2] at § 3.2(g).)

[8] The parties calculate total settlement value by combining the value of the seventy (70) bargaining unit positions and the $1,300,000.00 settlement fund.

Howard Industries' Laurel, Mississippi transformer facility between January 1, 2003, and August 25, 2008, and were not hired." (Motion [29].) Second, Plaintiffs ask that the Court preliminary approve the proposed Settlement Agreement as fair, adequate, and reasonable. These requests implicate Rule 23 of the Federal Rules of Civil Procedure.

The provisions of Rule 23(a) and (b) apply to "settlement-only class certification." *Amchem Prods. Inc. v. Windsor*, 521 U.S. 591, 620, 117 S. Ct. 2231, 138 L. Ed. 2d 689 (1997). However, "the likely difficulties in managing a class action" under Rule 23(b)(3)(D) need not be considered for class certification purposes since settlement precludes the possibility of protracted litigation and trial. *Id.* The other provisions of the Rule designed to protect absent class members "demand undiluted, even heightened, attention in the settlement context" since the court will be unable to adjust the class as the litigation proceeds. *Id.* The propriety of class certification for settlement purposes only has been recognized by numerous courts and commentators. *See, e.g.*, *Passafiume v. NRA Group, LLC*, 274 F.R.D. 424, 428 (E.D.N.Y. 2010) ("'[C]ertification of a class for settlement purposes only is permissible and appropriate.'"); *McNamara v. Bre-X Minerals Ltd.*, 214 F.R.D. 424, 425 (E.D. Tex. 2002) (granting request for conditional certification of class for settlement purposes only); *Manual for Complex Litigation (Fourth)* § 21.612, at p. 313 (2004) ("Settlement classes . . . can provide significant benefits to class members and enable the defendants to achieve final resolution of multiple suits."); 4 William B. Rubenstein et al., *Newberg on Class Actions* § 11:27 (4th ed. 2002) ("The settlement class has been recognized throughout the country as the best, most practical way to effectuate settlements involving large numbers of claims by relatively small claimants.").

Plaintiffs in this action assert that "'questions of law or fact common to class members predominate over any questions affecting only individual members, and . . . a class action is superior to other available methods for fairly and efficiently adjudicating the controversy.'" (Pls.' Mem. of Law [30] at p. 10) (quoting Fed. R. Civ. P. 23(b)(3)). "A class may be certified under Rule 23(b)(3) only if it meets the four prerequisites found in Rule 23(a) and the two additional requirements found in Rule 23(b)(3)." *Mullen v. Treasure Chest Casino, LLC*, 186 F.3d 620, 623 (5th Cir. 1999). The Fifth Circuit has also provided that Rule 23 implicitly requires that the settlement class "be adequately defined and clearly ascertainable". *John v. Nat'l Sec. Fire & Cas. Co.*, 501 F.3d 443, 445 n.3 (5th Cir. 2007) (citations omitted). The Court will address below whether the implicit and explicit requirements of Rule 23(a) and (b) have been met with respect to Plaintiffs' request for class certification.

If class certification is granted, settlement of the action requires court approval. *See* Fed. R. Civ. P. 23(e) ("The claims, issues, or defenses of a certified class may be settled, voluntarily dismissed, or compromised only with the court's approval."). Obtaining court approval for a class-wide settlement is a two-step process. First, the Court makes a preliminary evaluation as to the fairness of the proposed settlement. Second, if the preliminary evaluation is met, a formal fairness hearing is held "at which arguments and evidence may be presented in support of and in opposition to the settlement." *McNamara*, 214 F.R.D. at 426. A "full fairness analysis is unnecessary at th[e preliminary] stage" since all interested parties will have an opportunity to voice their positions regarding the proposed settlement at the formal fairness hearing. *Passafiume*, 274 F.R.D. at 430; *see also In re Chinese-Manufactured Drywall Prods.*

Liab. Litig., MDL NO. 2047, 2012 WL 92498, at *7 (E.D. La. Jan. 10, 2012) ("'At the stage of preliminary approval, the questions are simpler, and the court is not expected to, and probably should not, engage in analysis as rigorous as is appropriate for final approval.'") (quoting *Manual for Complex Litigation* § 21.6).

"[T]he district court maintains great discretion in certifying and managing a class action." *Mullen*, 186 F.3d at 624 (citing *Montelongo v. Meese*, 803 F.2d 1341, 1351 (5th Cir. 1986)). Such discretion extends to approving a class action settlement. *See In re Chicken Antitrust Litig. Am. Poultry*, 669 F.2d 228, 238 (5th Cir. Unit B 1982). Also, the district court should not ignore the "overriding public interest in favor of settlement," which applies "[p]articularly in class action suits" in considering whether or not to approve a class-wide settlement. *Kincade v. Gen. Tire & Rubber Co.*, 635 F.2d 501, 507 (5th Cir. 1981).

A. Whether the Proposed Settlement Class Is Adequately Defined and Clearly Ascertainable

A class is adequately defined and clearly ascertainable under Rule 23 if "'it is administratively feasible for the court to determine whether a particular individual is a member . . . .'" *Johnson v. Kansas City S.*, 224 F.R.D. 382, 388 (S.D. Miss. 2004), *aff'd*, 208 Fed. Appx. 292 (5th Cir. 2006) (qouting *McGuire v. Int'l Paper Co.*, 1994 WL 261360, at *3 (S.D. Miss. 1994)) (quoting 7A Wright, Miller & Kane, *Federal Practice and Procedure 2d* § 1760, at 121 (1986)). The requirement is not met if the court must "answer numerous fact-intensive questions" or resolve "the merits of the individual claims to determine whether a particular person is a member of the class." *Morrow v. Washington*, 277 F.R.D. 172, 187 (E.D. Tex. 2011) (citations omitted).

In this case, Plaintiffs request certification of the following class: all black and non-Hispanic white persons who applied for a bargaining unit position at Howard Industries' Laurel, Mississippi transformer facility between January 1, 2003, and August 25, 2008, and were not hired. Plaintiffs contend that class membership is "readily ascertainable" from Defendant HI's employment records. HI has not rebutted this contention. The Court finds that the proposed settlement class is sufficiently defined and ascertainable under these circumstances.

B. Whether the Four Threshold Requirements of Rule 23(a) Are Met

The requirements of Rule 23(a) are as follows:

> (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; and
>
> (4) the representative parties will fairly and adequately protect the interests of the class.

Fed. R. Civ. P. 23(a).

1. Rule 23(a)(1): Numerosity

"Although the number of members in a proposed class is not determinative of whether joinder is impracticable," a class with "100 to 150 members . . . is within the range that generally satisfies the numerosity requirement." *Mullen*, 186 F.3d at 624 (citations omitted). HI and Plaintiffs' counsel have estimated that approximately 5,000 black and non-Hispanic white individuals were denied employment at HI's Laurel facility between January 1, 2003, and August 25, 2008. The Court finds that Rule 23(a)(1)'s numerosity requirement is met given the number of potential class members in this

case; the likelihood that the class members are now "geographically dispersed"; and, the reasonable presumption that any class members hired by HI after August 25, 2008, "might be unwilling to sue individually or join a suit for fear of retaliation at their jobs." *Mullen*, 186 F.3d at 624-25 (finding that it was within the district court's discretion to hold that joinder of 100 to 150 individuals was impracticable).

2. Rule 23(a)(2): Commonality

Until the United States Supreme Court's decision in *Wal-Mart Stores v. Dukes*, 131 S. Ct. 2541, 180 L. Ed. 2d 374 (2011), the commonality inquiry was satisfied where there existed "at least one issue whose resolution will affect all or a significant number of putative class members." *James v. City of Dallas, Tex.*, 254 F.3d 551, 570 (5th Cir. 2001). *Wal-Mart* raised the bar for meeting Rule 23(a)(2)'s commonality requirement. *See M.D. ex rel. Stukenberg v. Perry*, 675 F.3d 832, 839 (5th Cir. 2012). Now, Rule 23(a)(2) requires the existence of "a common issue of law or fact whose resolution 'will *resolve* an issue that *is central to the validity* of each one of the [class member's] claims in one stroke.'" *Perry*, 675 F.3d at 840 (quoting *Wal-Mart*, 131 S. Ct. at 2551). In determining whether such an issue exists, "it may be necessary for the court to probe behind the pleadings . . . ." *Wal-Mart*, 131 S. Ct. at 2551. Frequently, such an analysis will involve "some overlap with the merits of the plaintiff's underlying claim." *Id.* The commonality requirement may be met if, for example, "examination of all the class members' claims for relief will produce a common answer to the crucial question *why was I disfavored*." *Id.* at 2552.

Plaintiffs in this case claim that:

> As early as August 2000, Howard Industries devised, implemented,

> carried out, and controlled an employm ent policy whereby Latino job applicants, all or nearly all being undocumented Mexican immigrants, were given preferential treatment in hiri ng at Howar d Industries' transformer manufacturing facility in Laur el, Mississippi. Pursuant to this policy, non-Latino applicants for employment were intentionally and routinely refused employment at Howard Industries' Laurel facility due to their race.

(1st Am. Compl. [2] at ¶ 15.) Plaintiffs further allege that HI "has been convicted of conspiracy to violate immigration laws arising out of its hiring and retention of undocumented employees." (1st Am. Compl. [2] at ¶ 17.) Also, Plaintiffs contend that in August of 2008, immigration officials raided HI's Laurel facility and "found approximately 592 undocumented employees." (1st Am. Compl. [2] at ¶ 20.) HI has denied Plaintiffs' claims of discrimination. However, HI has admitted to pleading guilty to conspiracy in violation of 18 U.S.C. § 371. (*See* Answer [10] at ¶ 17.) HI also admits that "immigration officials found approximately 592 employees whom the government alleged were unlawfully in the United States" during an immigration sweep at its Laurel transformer facility. (*See* Answer [10] at ¶ 20.)

In "prob[ing] behind the pleadings"[9] the Court finds that Plaintiffs implicitly contend that HI discriminated against them in favor of hiring Hispanic/Latino job applicants because it could pay those individuals less than it would have had to pay black or non-Hispanic white persons. Such an allegation, if proven true, would support the merits of the Plaintiffs and all proposed class members' claims of racial and/or national origin discrimination. Furthermore, each proposed class member could equally answer "because I am not of Hispanic/Latino descent" in response "to the crucial question *why was I disfavored*." *Wal-Mart*, 131 S. Ct. at 2552. Ultimately, Rule

[9] *Wal-Mart*, 131 S. Ct. at 2551.

23(a)(2)'s commonality requirement is met in this case because resolution of the question of whether HI "refused to hire non-Latino job applicants, or considered their applications with disfavor, due to their race"[10] would "'resolve an issue that is central to the validity of each of the [individual plaintiff's] claims in one stroke.'" *Perry*, 675 F.3d at 843 (quoting *Wal-Mart*, 131 S. Ct. at 2551).

3. Rule 23(a)(3): Typicality

The test for typicality "'focuses on the similarity between the named plaintiffs' legal and remedial theories and the theories of those whom they purport to represent.'" *Mullen*, 186 F.3d at 625 (quoting *Lightbourn v. County of El Paso*, 118 F.3d 421, 426 (5th Cir. 1997)). In this case, the named Plaintiffs' claims rest on the same arguments as the rest of the proposed class—*i.e.*, that they applied for employment at HI's transformer plant in Laurel, but were not hired due to HI's discriminatory hiring policies and practices. Thus, named Plaintiffs' claims are typical of the claims of the proposed class.

4. Rule 23(a)(4): Adequacy of Representation

"'Rule 23(a)'s adequacy requirement encompasses class representatives, their counsel, and the relationship between the two.'" *Stirman v. Exxon Corp.*, 280 F.3d 554, 563 (5th Cir. 2002) (quoting *Berger v. Compaq Computer Corp.*, 257 F.3d 475, 479 (5th Cir. 2001)). In conducting the adequacy inquiry, the district court considers "[1] the zeal and competence of the representative[s'] counsel and . . . [2] the willingness and ability of the representative[s] to take an active role in and control the litigation and to protect

[10] (1st Am. Compl. [2] at ¶ 18.)

the interests of absentees[.]" *Id.* This inquiry further "serves to uncover conflicts of interest between the named plaintiffs and the class they seek to represent." *Feder v. Elec. Data Sys. Corp.*, 429 F.3d 125, 130 (5th Cir. 2005) (citations omitted).

Class "'counsel must be qualified, experienced, and generally able to conduct the litigation.'" *In re Chinese-Manufactured Drywall*, 2012 WL 92498, at *10 (quoting Rubenstein, 1 *Newberg on Class Actions* § 3:21). Plaintiffs in this case represent the following: "Class Counsel have extensive experience in trial litigation, including litigating class action and employment-related claims. In addition, Class Counsel have the ability and resources to vigorously pursue the claims; indeed, they have already incurred tens of thousands of dollars in expenses during this litigation and in pursuing this settlement." (*See* Pls.' Mem. of Law [30] at pp. 9-10.) The Court has no reason to doubt these representations. The Court therefore concludes that proposed class counsel will adequately represent and protect the proposed class.

"Differences between named plaintiffs and class members render the named plaintiffs inadequate representatives only if those differences create conflicts between the named plaintiffs' interests and the class members' interests." *Mullen*, 186 F.3d at 625-26 (citing *Jenkins v. Raymark Indus., Inc.*, 782 F.2d 468, 472 (5th Cir. 1986)). The Court does not perceive any significant differences between the named Plaintiffs and the proposed class members. Each member of the proposed class, including the named Plaintiffs, was denied employment at HI's Laurel facility between January 1, 2003, and August 25, 2008, allegedly because of their race or national origin. The interests of the named Plaintiffs and proposed class members are sufficiently aligned under Rule 24(a) and the adequacy of representation requirement is met in this cause.

C. Whether Certification Is Appropriate Pursuant to Rule 23(b)(3)

Certification under Rule 23(b)(3) requires the Court to find "[1] that the questions of law or fact common to class members predominate over any questions affecting only individual members, and [2] that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3). The Fifth Circuit refers "to these two requirements respectively as the 'predominance' and 'superiority' criteria." *Regents of Univ. of Cal. Credit v. Suisse First Boston (USA), Inc.*, 482 F.3d 372, 382 (5th Cir. 2007) (citing *Steering Committee v. Exxon Mobil Corp.*, 461 F.3d 598, 600 (5th Cir. 2006)).

1. Rule 23(b)(3): Predominance

The "predominance inquiry tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation." *Amchem*, 521 U.S. at 623. "[C]ommon issues must constitute a significant part of the individual cases" so as to predominate. *Mullen*, 186 F.3d at 626 (citing *Jenkins*, 782 F.2d at 472). The Court finds that the following issues common to the proposed settlement class predominate in this action: 1) whether HI violated 42 U.S.C. § 1981 by discriminating on the basis of race in favoring Hispanic job applicants over black and non-Hispanic white applicants for bargaining unit positions at its transformer plant in Laurel, Mississippi from January 1, 2003, to August 25, 2008 (the "relevant time period"); and 2) whether HI violated 42 U.S.C. § 2000e-2 by discriminating on the basis of race or national origin in favoring Hispanic job applicants over black and non-Hispanic white applicants for bargaining unit

positions at its transformer plant during the relevant time period.[11] The fact that federal law, as opposed to state law, will determine these issues weighs in favor of the predominance inquiry being met in this case.[12] Each proposed class member essentially suffering the same type of injury–not being hired by HI–also supports a finding of predominance under Rule 23(b)(3). *See Cordes & Co. Fin. Servs., Inc. v. A.G. Edwards & Sons, Inc.*, 502 F.3d 91, 107 (2d Cir. 2007) (common legal issue existed for purposes of predominance inquiry where class members "suffered the same type of injury"); *Frank v. Gov't of the Virgin Islands*, No. 2009-66, 2010 WL 1286077, at *7 (D.V.I. Mar. 31, 2010) (predominance requirement met where the "same type of injuries . . . unite[d] the class").

2. Rule 23(b)(3): Superiority

The Court finds the following factors listed under Rule 23(b)(3) useful in determining whether a class action is superior to other methods for effectively adjudicating this controversy: "(A) the class members' interests in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of

---

[11] Plaintiffs assert that HI's policies and practices related to hiring, and its personnel involved in hiring, remained largely unchanged during the relevant time period. (Pls.' Mem. of Law [30] at p. 11.) Thus, members of the proposed class were subject to basically the same hiring processes wielded by the same decision makers. (Pls.' Mem. of Law [30] at p. 11.) HI has not rebutted this contention. Further, the Information [1] filed against HI in Criminal Case No. 2:11cr8 lends credence to this allegation.

[12] *Compare Mullen*, 186 F.3d at 627 (affirming the district court's predominance finding where federal law controlled and there were "no individual choice-of-law issues"), *with Stirman*, 280 F.3d at 564 (finding that the district court "did not take into account significant variations in state law that defeat predominance").

any litigation concerning the controversy already begun by or against class members; [and] (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum . . . ."[13]

First, the proposed class members' interests in individually controlling the prosecution of separate actions are relatively low "because it is likely that each individual class member could only pursue relatively small claims,"[14] and because questions of federal law will apply to each proposed class member. *See Roper v. Consurve, Inc.*, 578 F.2d 1106, 1112 (5th Cir. 1978) (finding a class action superior where the individual claims were relatively small and the question of law applied alike to all), *aff'd sub nom. Deposit Guar. Nat'l Bank, Jackson, Miss. v. Roper*, 445 U.S. 326, 100 S. Ct. 1166, 63 L. Ed. 2d 427 (1980). Second, a review of all cases pending in the U.S. District Court for the Southern District of Mississippi reveals none alleging discrimination on the basis of race or national origin against HI, other than this action. Third, certification would promote judicial economy and further one of the central purposes of the class action vehicle, "'enhanc[ing] the efficacy of private actions by permitting citizens to combine their limited resources to achieve a more powerful litigation posture.'" *Roper*, 578 F.2d at 1113 (quoting *Hawaii v. Standard Oil Co. of Cal.*, 405 U.S. 251, 266, 92 S. Ct. 885, 893, 31 L. Ed. 2d 184 (1972)). The alternative, potentially thousands of virtually identical individual lawsuits, is in no way superior.

---

[13] The Court need not consider "the likely difficulties in managing" the trial of the class action under Rule 23(b)(3)(D) since the parties seek class certification for settlement purposes only. *See Amchem*, 521 U.S. at 620.

[14] *Wright v. Linkus Enters., Inc.*, 259 F.R.D. 468, 474 (E.D. Cal. 2009) (certifying class for settlement purposes).

In light of the forgoing, the court concludes that the requirements for class certification under Rule 23(a) and (b)(3) are satisfied in this cause. Thus, the Court will certify Plaintiffs' proposed class for purposes of settlement only. The Court's grant of certification may be altered or amended if any basis for such action comes to light at any time before final judgment. *See* Fed. R. Civ. P. 23(c)(1)(C). The Court further finds that the law firms of Pigott & Johnson, P.A., by Cliff Johnson, and the Law Offices of Lisa Ross, by Lisa M. Ross, will be appointed Class Counsel pursuant to Rule 23(g). The submissions before this Court evidence that these attorneys have performed substantial work in pursuing the claims at issue in this action, and that they have experience in handling similar claims. Further, it is evident that these attorneys have knowledge of the applicable law and that they have and will contribute significant resources to implementing the proposed settlement.

D. Whether, As a Preliminary Matter, the Proposed Settlement Agreement Is Fair, Adequate, and Reasonable

A district court has discretion to approve a class action settlement under Federal Rule of Civil Procedure 23(e) if the proposed "settlement is fair, adequate, and reasonable." *Ayers v. Thompson*, 358 F.3d 356, 368 (5th Cir. 2004) (citing *Parker v. Anderson*, 667 F.2d 1204, 1208-09 (5th Cir. Unit A 1982)). In assessing whether a proposed settlement satisfies this standard, the Fifth Circuit has identified six key points of analysis, known as the "*Reed* factors." *Union Asset Mgmt. Holding A.G. v. Dell, Inc.*, 669 F.3d 632, 639 (5th Cir. 2012) (citing *Reed v. Gen. Motors Corp.*, 703 F.2d 170 (5th Cir. 1983)). These six factors are:

> (1) the existence of fraud or collusion behind the settlement; (2) the complexity, expense, and likely duration of the litigation; (3) the stage of the

> proceedings and the amount of discovery completed; (4) the probability of plaintiffs' success on the merits; (5) the range of possible recovery; and (6) the opinions of the class counsel, class representatives, and absent class members.

Id. at 639 n.11. Notwithstanding the breadth of these factors, the court is not to "adjudicate the dispute" or "try the case" in determining the adequacy and reasonableness of the settlement since "[t]he very purpose of the compromise is to avoid the delay and expense of such a trial." *Parker*, 667 F.2d at 1209 (internal quotation marks omitted) (citing *Young v. Katz*, 447 F.2d 431, 433 (5th Cir. 1971)). The court should also bear in mind the "overriding public interest in favor of settlement" in considering a request to approve a class-wide settlement. *Cotton v. Hinton*, 559 F.2d 1326, 1331 (5th Cir. 1977).

Since the Court will have an opportunity to hear fully from the parties, their counsel and any potential objectors regarding the adequacy of the proposed settlement at the fairness hearing, a detailed application of the *Reed* factors is not required at this time. *Cf. In re Chinese-Manufactured Drywall*, 2012 WL 92498, at *7; *McNamara*, 214 F.R.D. at 430. Nonetheless, the Court finds the factors useful in determining as a preliminary matter whether the settlement should be approved.

1. Evidence of Fraud or Collusion

No evidence of fraud or collusion concerning the settlement is apparent at this point in time. Instead, it appears that the Settlement Agreement is the product of substantial, arms-length negotiations between the parties over a period of months.

2. Complexity, Expense, and Duration of Litigation

This action is still in its initial stages since discovery on the merits of Plaintiffs'

claims and HI's defenses has been stayed pending resolution of the class certification issues. (*See* Case Mgmt. Order [14].) Thus, "settling now avoids the risks and burdens of potentially protracted litigation" and allows for the conservation of substantial litigation expenses and scarce judicial resources. *Ayers*, 358 F.3d at 369. Furthermore, because statistical evidence is often necessary for a plaintiff make out a prima facie case under Title VII, the "complex" nature of an "employment discrimination" case is well-recognized. *See Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 995 n.3, 108 S. Ct. 2777, 101 L. Ed. 2d 827 (1988).

3. The Stage of Litigation and Available Discovery

"[F]ormal discovery is not a prerequisite to approving a settlement as reasonable." *Dell, Inc.*, 669 F.3d at 639. What is required under the third *Reed* factor is that "'the parties and the district court possess ample information with which to evaluate the merits of the competing positions.'" *Id.* (quoting *Ayers*, 358 F.3d at 369). The Court notes that the parties have exchanged initial disclosures and participated in some discovery relating to class certification. Further, Plaintiffs contend that the parties are well aware of the strengths and weaknesses of their positions regarding class certification and that the Settlement Agreement is the product of substantial negotiations informed by the knowledge of those strengths and weaknesses. At this stage, the Court will accept Plaintiffs' representation that the parties have "achieved the desired quantum of information necessary to achieve a settlement." *Cotton*, 559 F.2d 1332. The Court will reserve final judgment on the third *Reed* factor until after it receives further information regarding the parties' competing positions at the formal fairness hearing.

4. The Probability of Plaintiffs' Success on the Merits

"[A]bsent fraud or collusion, the most important factor is the probability of the plaintiffs' success on the merits." *Parker*, 667 F.2d at 1209 (citations omitted). The settlement offer can be deemed "inadequate only in light of the strength of the case presented by the plaintiffs." *Id.* Plaintiffs have pointed out several weaknesses in their case. For instance, a significant amount of time has passed since the relevant hiring decisions were made, making proof of what occurred more difficult to discover, and key personnel making employment decisions during the relevant time period no longer work for Defendant. Furthermore, each individual applicant's qualifications for employment and Defendant's demand for workers at specific times would be greatly disputed at trial. The Court also takes notice of several potentially meritorious defenses asserted in Defendant's Answer [10], including, but not limited to, the running of the applicable statute of limitations. Moreover, the Fifth Circuit has often recognized the difficult nature of proving claims of employment discrimination.[15] Plaintiffs' concerns over their ability to prove their claims at trial are legitimate and the likelihood of Plaintiffs obtaining a jury verdict in their favor is far from certain.

5. The Range of Possible Recovery

The Settlement Agreement requires HI to establish a settlement fund of

---

[15] *See, e.g.*, *Cordovi v. N.E. Med. Center Hosp.*, 95 F.3d 50, 1996 WL 457407, at *2 (5th Cir. July 15, 1996) ("Though it is often difficult to prove employment discrimination, the plaintiff must establish more than subjective beliefs . . . ."); *Kelly v. Boeing Petroleum Servs., Inc.*, 61 F.3d 350, 359 (5th Cir. 1995) ("[I]n employment discrimination cases, . . . plaintiffs must face the difficult task of persuading the fact-finder to disbelieve an employer's account of its own motives."); *Marcantel v. La. Dep't of Transp. & Dev.*, 37 F.3d 197, 200 (5th Cir. 1994) (recognizing that Supreme Court precedent makes the problem of proving unlawful discriminatory intent "more difficult for many Title VII plaintiffs"); *Parker*, 667 F.2d at 1210 (noting problems of "showing discriminatory intent for Title VII claims not based on adverse impact").

$1,300,000.00. Sums will be paid from the fund to Qualified Class Members in varying amounts, depending upon whether a class member was eventually hired by HI, qualified for employment, and/or is a named Plaintiff.[16] In addition, HI will offer seventy (70) Qualified Class Members a bargaining unit position in its Laurel transformer plant. The seventy (70) bargaining unit positions have been valued at $25,000.00 per position for purposes of the Settlement Agreement. Given the weaknesses in Plaintiffs' case noted above, the Court cannot say at this time that the proposed relief under the Settlement Agreement "is pegged at a point in the range [of possible recovery] that is [un]fair to the plaintiff settlors." *Maher v. Zapata Corp.*, 714 F.2d 436, 460 (5th Cir. 1983) (citing *In re Corrugated Container Antitrust Litig.*, 643 F.2d 195, 213 (5th Cir. 1981)).

6. The Opinions of Class Counsel, Class Representatives, and Absent Class Members

Class Counsel and the named Plaintiffs clearly favor the settlement as evidenced by the Motion [29]. HI and its attorneys also favor the settlement as evidenced by the Settlement Agreement [29-2] and the lack of opposition to Plaintiffs' Motion [29]. The opinions of absent class members have not yet been voiced since this Court must first preliminarily approve the settlement before notice of it is afforded to them.

As a whole, the Court concludes that the *Reed* factors support the preliminary approval of the Settlement Agreement. The Court will undertake a full examination of the fairness, adequacy, and reasonableness of the Settlement Agreement after it has

[16] The Court will require the parties to explain fully the justification for establishing payments in varying amounts prior to final approval of the settlement, so as to ensure that the settlement does not improperly grant preferential treatment to certain class members.

heard further from all interested parties at the fairness hearing. Also, the Court will address the issue of attorney's fees and costs in favor of Class Counsel after a motion is filed in accordance with Rule 23(h).

E. Whether the Proposed Notice to Class Members Is Sufficient

For classes certified under Rule 23(b)(3):

> [T]he court must direct to class members the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice must clearly and concisely state in plain, easily understood language:
>
> **(i)** the nature of the action;
>
> **(ii)** the definition of the class certified;
>
> **(iii)** the class claims, issues, or defenses;
>
> **(iv)** that a class member may enter an appearance through an attorney if the member so desires;
>
> **(v)** that the court will exclude from the class any member who requests exclusion;
>
> **(vi)** the time and manner for requesting exclusion; and
>
> **(vii)** the binding effect of a class judgment on members under Rule 23(c)(3).

Fed. R. Civ. P. 23(c)(2)(B). Rule 23(e) also requires courts to "direct notice in a reasonable manner to all class members who would be bound by the [settlement] proposal." Fed. R. Civ. P. 23(e)(1). Individual notice by mail to class members who can be identified though reasonable efforts is usually sufficient. *See In re Nissan Motor Corp. Antitrust Litig.*, 552 F.2d 1088, 1098 (5th Cir. 1977).

The form and manner of the Notice of Class Action and Proposed Settlement [29-4] and Class Action Settlement Verification Form [29-6], to be completed and returned by the Qualified Class Members, have been negotiated and agreed upon by all counsel. (*See* Exs. "3" and "5" to Pls.' Motion [29].) The parties have proposed that

upon entry of an Order granting Plaintiffs' Motion [29], L. Stephens Tilghman as Claims Administrator will notify class members of their right to opt out of the class and/or to object to the Settlement Agreement by mailing a copy of the Notice of Class Action and Proposed Settlement ("Class Settlement Notice") to the last known address of each class member. In addition, the Class Settlement Notice will be published in a local newspaper once per week for three weeks. Defendant will be responsible for the costs of the Class Settlement Notice.

The Court finds that the parties' planned method of notifying class members of certification and the proposed settlement is reasonable and adequate under the circumstances. The Court also finds that the content of the proposed Class Settlement Notice discloses in readily understandable terms "sufficient information for individual class members to make informed choices about . . . [opting out of the class action] and accepting or objecting to the settlement." *In re Corrugated Container Antitrust Litig.*, 643 F.2d at 223. Class members are advised of the legal claims at issue in the action, HI's denial of liability, and the class certification definition. Class members are also informed when and how to request exclusion from the lawsuit, and when and how to object to the proposed settlement. The Class Settlement Notice further advises of the binding effect of a class-wide judgment and informs class members how they can obtain more detailed information about the lawsuit and proposed Settlement Agreement.[17] The

[17] The Settlement Agreement [29-2] can be viewed online by any member of the public with a public access to court electronic records ("PACER") account. An individual without a PACER account can view the Settlement Agreement by visiting the Clerk's office at the U.S. District Court, 701 N. Main Street, Suite 200, Hattiesburg, Mississippi, 39401.

notice requirements under Rule 23(c)(2)(B) and (e)(1) are met under these circumstances.

III. CONCLUSION

For the foregoing reasons:

IT IS ORDERED AND ADJUDGED that Plaintiffs' Motion for Conditional Certification of the Class and for Preliminary Approval of Class Action Settlement [29] is granted. Accordingly,

1. ***Class Certification***. The Court certifies the following Class for settlement purposes only pursuant to Federal Rule of Civil Procedure 23(b)(3): All black and non-Hispanic white persons who applied for a bargaining unit position at Howard Industries' Laurel, Mississippi transformer facility between January 1, 2003, and August 25, 2008, and were not hired.

If, for any reason, the Settlement Agreement ultimately does not become effective, Defendant's agreement to the certification of the Class will be null and void in its entirety; the certification of the settlement class effected in this Order will be null and void in its entirety; the parties shall return to their respective positions in this lawsuit as those positions existed immediately before the parties executed the Settlement Agreement; and nothing stated in the Settlement Agreement or in this Order shall be deemed an admission of any kind by any of the parties or used as evidence against, or over the objection of, any of the parties for any purpose in this action or in any other action.

2. ***Class Representatives; Class Counsel***. Plaintiffs Veronica Cook, Yolanda

Phelps, Charlyn Dozier, and Seleatha McGee are appointed as representatives of the Class. The law firms of Pigott & Johnson, P.A., by Cliff Johnson, and the Law Offices of Lisa Ross, by Lisa M. Ross, are appointed as Class Counsel.

3. ***Preliminary Approval of the Proposed Settlement***. The Court preliminary approves the proposed settlement between the parties, as evidenced by and delineated in the Settlement Agreement [29-2] (hereinafter referred to as the "Settlement" or "Settlement Agreement") as fair, adequate, and reasonable.

4. ***Notice of Class Certification and the Proposed Settlement***. The form and content of the proposed Notice of Class Action and Proposed Settlement [29-4] (attached to Plaintiffs' Motion [29] as Exhibit "3") are approved by the Court. In addition, the Court approves the protocol for dissemination of the "Notice" as set forth in Section 4.2 of the Settlement Agreement [29-2]. Therefore, upon entry of this Order, the Defendant via the Claims Administrator shall notify Class Members of their right to opt-out of the Class and/or to object to the Settlement by mailing a copy of the Notice incorporating the fairness hearing date and deadlines set forth in this Order to the last known address of each Class Member as it appears in Defendant's records. The Notice shall be sent by first class mail and published in a local newspaper once per week for three weeks. The Claims Administrator shall use reasonable efforts to complete the mailing of the Notice by the later of October 10, 2012 or thirty (30) days after the date of entry of this Order. Any Notice returned as undeliverable shall be forwarded to any forwarding address provided by the U.S. Postal Service. If no such forwarding address is provided, the Claims Administrator shall utilize the services of a third-party vendor,

such as National Change of Address Services or Mail Net Services, Inc., to attempt to obtain the most recent addresses for the undelivered Notices. The costs of Notice will be paid by Defendant.

5. ***Final Fairness Hearing***. On January 23, 2013, at 10:00 a.m., the Court will hold a Final Fairness Hearing in Courtroom 1 at the United States Courthouse, 701 N. Main Street, Hattiesburg, Mississippi, 39401. The hearing will be held to determine, among other things: (a) whether this action may be permanently certified as a class action for settlement purposes only; (b) whether the Settlement Agreement and its terms and conditions are fair, reasonable, and adequate and should be finally approved by the Court; (c) whether a final judgment should be entered dismissing this action with prejudice; (d) the amount of attorney's fees and costs to be awarded to Class Counsel; and (e) any other such matters the Court deems appropriate.

6. ***Deadlines for Motion for Judgment and Final Approval, Motion for Attorney's Fees and Costs, and Related Filings.*** Plaintiffs and Defendant shall submit a Joint Motion for Judgment and Final Approval of Settlement no later than December 24, 2012. Plaintiffs shall also file a Motion for Attorney's Fees and Costs no later than December 24, 2012. Any other papers in support of the certification of the Class and final approval of the Settlement Agreement shall be filed with the Court and served on all parties at least five (5) days before the fairness hearing. Any papers in response to any objection filed regarding any matter to be heard at the fairness hearing shall be filed with the Court and served on all parties and on the objector at least five (5) days before the hearing.

7. ***Deadline for Members of the Class to Request Exclusion from the Lawsuit and Settlement***. The deadline for Class Members to opt-out of the Class is set at November 29, 2012. To opt-out, Class Members must submit a request for exclusion to the Claims Administrator, who will provide copies to Class Counsel and Defendant's counsel. The request for exclusion must be sent by registered mail, postmarked no later than November 29, 2012 and must include the individual's full name, address, the name and cause number of this lawsuit (*Cook v. Howard Industries, Inc.*, Case No. 2:11cv41), and a statement of the individual's intention to opt-out of the Settlement. Class Counsel shall inform Defendant's Counsel of any communication from a Class Member that implies in any way that the Class Member may not wish to participate in the Settlement. The request for exclusion shall be sent to:

L. Stephens Tilghman
Tilghman & Co., P.C.
P.O. Box 11250
Birmingham, AL 35202

8. ***Deadline for Filing Objections to Matters to Be Heard at the Fairness Hearing and for Filing Notices of Appearance***. Any Class Member who wishes to object to the fairness, reasonableness, or adequacy of the proposed Settlement must file with the Clerk of the Court and serve his or her objection on all counsel, no later than ten (10) days before the Final Fairness Hearing. The written objection must include: (1) the name and cause number of this lawsuit (*Cook v. Howard Industries, Inc.*, Case No. 2:11cv41); (2) the objector's full name and current address; (3) the objector's dated signature; (4) a statement of each specific reason the Settlement should not be approved; and (5) any legal or evidentiary support the objector wishes to

bring to the Court's attention in support of the objection. Class Members may so act either on their own or through any attorney hired at their own expense. The Class Member, or attorney acting on his or her behalf, also must: (1) file a notice of appearance with the Clerk of Court no later than ten (10) days prior to the fairness hearing, and (2) mail a copy of such notice of appearance by first class United States Mail to Class Counsel and Defendant's Counsel.

Class Counsel:

Cliff Johnson
Pigott & Johnson, P.A.
775 N. Congress Street
Post Office Box 22725
Jackson, Mississippi 39225-2725

Lisa M. Ross, Esq.
Law Offices of Lisa Ross
514 E. Woodrow Wilson Ave.
Jackson, Mississippi 39283-1264

Defendant:

Richard L. Yoder
Richard Lewis Yoder, Jr.
Gilchrist Sumrall Yoder & Boone, PLLC
415 North Magnolia Street, Suite 400
Post Office Box 106
Laurel, Mississippi 39441-0106

Jay T. Jorgensen
Sidley Austin LLP
1501 K Street NW
Washington, DC 20005

Any Class Member who files and serves a written objection in accordance with this section may appear at the Final Fairness Hearing to object to any aspect of the fairness, reasonableness, or adequacy of the Settlement Agreement. A Class Member

who does not timely file and serve such a written objection shall not be heard at the fairness hearing.

Subject to the Court's discretion, any Class Member (or attorney) who fails to comply with the provisions of this section, and who has not opted out of the Class as provided in the preceding section of this Order, shall waive and forfeit any and all rights the Class Member may have to appear separately and/or to object and shall be bound by all the terms of the Settlement Agreement and by all proceedings, orders and judgments in this action.

9. ***No Admission of Liability***. The parties entered into the Settlement Agreement solely for the purpose of compromising and settling disputed claims. Defendant has in no way admitted any violation of law or any liability whatsoever to named Plaintiffs and the Class, individually or collectively. Defendant has expressly denied all such liability. Defendant has entered into the Settlement to avoid further protracted litigation and to resolve and settle all disputes with named Plaintiffs and the Class.

10. ***Effect of Failure to Grant Final Approval***. In the event the Court does not enter judgment in accordance with the Settlement Agreement, or the Settlement does not receive final approval, this action shall continue as if the Settlement had not been attempted unless the Parties jointly agree to: (1) seek reconsideration or appellate review of the decision denying entry of judgment, or (2) attempt to renegotiate the settlement and seek Court approval of the renegotiated settlement. In the event any reconsideration and/or appellate review is denied, the Parties shall have no further

rights or obligations under the Settlement Agreement or this Order. If the Settlement is not ultimately approved, the case will proceed as if no Settlement had been attempted. In that event, the class certified for purposes of settlement shall be decertified, and Defendant retains the right to contest whether this case should be maintained as a class action and to contest the merits of the claims being asserted by Plaintiffs in this action.

SO ORDERED AND ADJUDGED this the 5th day of October, 2012.

s/Keith Starrett
UNITED STATES DISTRICT JUDGE