

**\*\*NOT FOR PRINTED PUBLICATION\*\***

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF TEXAS  
LUFKIN DIVISION

SYLVESTER MCCLAIN, on his own behalf §  
and on behalf of a class of similarly situated §  
persons, ET AL., §

*Plaintiffs,* §

v. §

LUFKIN INDUSTRIES INC., §

*Defendant.* §

CIVIL ACTION No. 9:97CV63

JUDGE RON CLARK

**FINAL JUDGMENT**

After affirming the court’s earlier judgment that Defendant Lufkin Industries Inc.’s promotion practices had a disparate impact on black employees, the Fifth Circuit remanded this case to this court to calculate the back pay award attributable to these discriminatory practices, to craft an adequate remedial order on injunctive relief, and to award counsel a reasonable reimbursement. *McClain v. Lufkin Indus., Inc.*, 519 F.3d 264, 284 (5th Cir. 2008). In response to that mandate, and in accordance with earlier interim orders of this court and agreements of the parties, the court enters this final judgment pursuant to Rule 58 of the Federal Rules of Civil Procedure.

**I. Permanent Injunction**

Pursuant to the Fifth Circuit’s mandate [Doc. #579], the parties’ joint report of February 19, 2009 [Doc. #606], and the parties’ amended joint submission of November 13, 2009 [Doc. #681], the court entered a permanent injunction on

December 18, 2009 [Doc. #683] to remedy Defendant’s discrimination against black employees when determining promotions for hourly and salaried positions. It is hereby **ORDERED** that Defendant Lufkin Industries Inc. shall comply with, and fully implement, the permanent injunction, a copy of which is attached to this judgment as Appendix 1 and is hereby incorporated by reference.

**II. Monetary Relief**

It is further **ORDERED** that Defendant Lufkin Industries Inc. shall pay to Plaintiffs the following amounts:

1. Three Million Two Hundred Sixty-nine Thousand Eight Hundred Forty-eight Dollars (\$3,269,848.00) in back pay;
2. Two Million Two Hundred Eighteen Thousand Four Hundred Twenty-one Dollars and Forty-eight Cents (\$2,218,421.48) in pre-judgment interest; and
3. Post-judgment interest on the entire sum calculated pursuant to 28 U.S.C. § 1961 at the rate of 0.41%;

for all of which let execution issue if not timely paid.

It is further **ORDERED** that the Back Pay Award shall be allocated as follows between hourly and salaried promotions for the following time periods:

Time Period	Hourly Promotions	Salaried Promotions
1994-1995	\$483,340.00	\$109,868.00
1996-2002	\$1,901,417.00	\$128,055.00
2003-2004	\$487,756.00	\$0.00
2004-2007	\$159,412.00	\$0.00

It is further **ORDERED** that the pre-judgment interest shall be allocated as follows between hourly and salaried promotions for each year:

Year	Hourly Promotions	Salaried Promotions
1994	\$245,124.80	\$55,719.32
1995	\$274,907.73	\$62,489.27
1996	\$254,518.12	\$17,141.07
1997	\$229,463.40	\$15,453.70
1998	\$205,601.76	\$13,846.69
1999	\$182,876.39	\$12,316.20
2000	\$161,175.33	\$10,854.70
2001	\$140,565.50	\$9,466.68
2002	\$120,937.09	\$8,144.77
2003	\$91,797.00	\$0.00
2004	\$75,769.74	\$0.00
2005	\$13,192.50	\$0.00
2006	\$10,033.90	\$0.00
2007	\$7,025.82	\$0.00

The above pre-judgment interest was calculated at a rate of 5.0% per annum, compounded annually. The back pay award for each time period was annualized and attributed to each calendar year within each period. For each year, interest began to accrue on July 1 of that year, except for 1994, where interest began to accrue on August 1, 1994.

It is further **ORDERED** that back pay and pre-judgment interest shall be divided among Named Plaintiffs, Class Representatives, and Class Members according to the methods and procedures specified in this section and in this court's Order Re: Monetary Relief entered December 22, 2009 [Doc. #684], a copy of which is attached to this judgment as Appendix 2 and is hereby incorporated by reference. In the event of any conflict between said Order Re:

Monetary Relief and this judgment, the terms of this judgment control. It is further **ORDERED** that the administration of amounts awarded, allocation of amounts awarded, notice to Class Members, and procedures for challenges by Class Members shall be accomplished as set out in said Order Re: Monetary Relief.

**A. Per Capita Awards to All Class Members**

Each Class Member who worked less than ninety (90) days in hourly and salaried positions during the class period shall be entitled to receive \$375.00 as a Class Member Per Capita Award, and each Class Member who worked ninety (90) or more days in hourly and salaried positions during the class period shall be entitled to receive \$750 as a Class Member Per Capita Award. Per Capita Awards will be deducted from the Back Pay Award prior to the pro rata distribution described below.

**B. Participation Awards to Named Plaintiffs, Class Representatives, and Participating Class Members**

The court awards Participation Awards in the following amounts to Named Plaintiffs, Class Representatives, and Class Members for time spent assisting Class Counsel in the prosecution of this case:

Name	Participation Award
Walter Butler	\$7,000.00
Vivian Crain	\$4,000.00
Calvin Deason	\$3,000.00
Clifford Duirden	\$8,000.00
Leroy Garner	\$6,000.00
Roald Mark	\$6,000.00
Eddie Mask	\$8,000.00

Name	Participation Award
Sylvester McClain	\$18,000.00
Rickey Menefee	\$1,000.00
Clarence Owens	\$8,000.00
Kelvin Pope	\$5,000.00
Earl Potts	\$8,000.00
Patrick Ross	\$6,000.00
Kenneth Singleton	\$2,000.00
Sherry Swint	\$5,000.00
Buford Thomas	\$14,000.00
Curtis Thomas	\$1,000.00
Shirley Thomas	\$1,000.00
Florine Thompson	\$12,000.00
Benny Townsend	\$1,000.00
James White	\$2,000.00
Mary Williams	\$8,000.00

### **C. Back Pay Awards Based on Time Worked**

The balance of the Class Monetary Relief Fund, consisting of the remaining Back Pay Award and all of the pre-judgment interest, will be distributed pro rata, with the Back Pay Award distribution based on the time worked during the entire liability period, and the interest distribution based on the time worked during each calendar year. The time worked calculations and the amounts due based on such time worked shall be done for hourly and salaried categories of workers, and for the time periods 1994-1995, 1996-2002, 2003-2004, and 2005-2007, as set out in the Order Re: Monetary Relief.

### III. Attorneys' Fees, Costs, and Litigation-Related Expenses

Pursuant to the Fifth Circuit's mandate [Doc. #579], Plaintiffs' application, and the parties' briefing thereon, the court, on April 2, 2009, entered an order [Doc. #621] and directed entry of a judgment [Doc. #622] for attorneys' fees, litigation-related expenses, and costs of court incurred prior to January 1, 2009, and ordered Defendant Lufkin Industries Inc. to pay to Plaintiffs the following amounts:

1. Four Million Seven Hundred Forty Thousand One Hundred Ninety-five Dollars and Eighty Cents (\$4,740,195.80) in attorneys' fees;
2. Nine Hundred Thirty-two Thousand Six Hundred Three Dollars and Eighty-four Cents (\$932,603.84) in litigation-related expenses;
3. One Hundred Forty Thousand Five Hundred Sixty-two Dollars and Twenty-six Cents (\$140,562.26) in taxable costs; and
4. Post-judgment interest on those sums calculated pursuant to 28 U.S.C. § 1961 at the rate of 0.59%.

Copies of the court's Order Re: Attorneys' Fees [Doc. #621] and Rule 54(b) judgment [Doc. #622] are attached to this judgment as Appendix 3 and are hereby incorporated by reference. The court is informed that Defendant Lufkin Industries Inc. has paid Plaintiffs the amounts awarded in the Order Re: Attorneys' Fees and Rule 54(b) judgment, subject to its right to appeal.

Plaintiffs are hereby **ORDERED** to comply with Federal Rule of Civil Procedure 54(d)(1) and 54(d)(2), and with Local Rule CV-54, with regard to attorneys' fees, litigation-related expenses, and costs for their work on this case during the time period from January 1, 2009 through the date of this judgment, by submitting the bill of costs and claim for attorneys' fees specified in those Rules no later than fourteen (14) days after entry of this judgment. The court retains jurisdiction of this matter for purposes of receiving and ruling on

this and any further application(s) for attorneys' fees, litigation-related expenses, and costs incurred by Plaintiffs' counsel after the date of this judgment pursuant to a schedule to be determined by the court following receipt of Plaintiffs' bill of costs and claim for attorneys' fees.

#### **IV. Conclusion**

It is further **ORDERED** that all relief not specifically granted herein is **DENIED**. All pending motions not previously ruled on are **DENIED**. This is a final judgment and is appealable.

So **ORDERED** and **SIGNED** this **15** day of **January, 2010**.



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Ron Clark, United States District Judge

# Appendix 1



**\*\*NOT FOR PRINTED PUBLICATION\*\***

IN THE UNITED STATES DISTRICT COURT  
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SYLVESTER MCCLAIN, on his own behalf §  
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CIVIL ACTION No. 9:97CV63

JUDGE RON CLARK

**INJUNCTION**

The Fifth Circuit, in vacating the Court’s earlier injunction, remanded to this Court “to craft an adequate remedial order that will eliminate discrimination without hobbling Lufkin’s legitimate promotion policies.” *McClain v. Lufkin Industries, Inc.*, 519 F.3d 264, 284 (5th Cir. 2008). The Court of Appeals left to this Court “the task of reviewing afresh the propriety of the injunction, and if it is found necessary, of balancing plaintiffs’ requests for stronger measures to ensure Lufkin’s compliance with the imprecision of the liability finding.” *Id.*

In carrying out the Fifth Circuit’s mandate, the Court has held multiple status conferences with the parties in an attempt to narrow the disputed issues and identify areas of agreement. In addition, subject to and without waiver of the parties’ rights to appeal, the parties have reached agreements, incorporated into stipulations, on certain other issues related to the scope and terms of

injunctive relief.<sup>1</sup> In this Order, the Court (1) incorporates and combines the parties' stipulations, so that all issues previously resolved or determined are set forth in this Order, (2) provides for the specific injunctive relief to be implemented by Defendant Lufkin Industries, Inc. ("Lufkin" or "Defendant"), and (3) provides for the procedures and methods by which this Injunction shall be implemented, monitored, and enforced.

Therefore, pursuant to Federal Rule of Civil Procedure 65, the Court enters this permanent injunction to partially remedy the discrimination found by Judge Cobb, and affirmed by the Fifth Circuit, toward black employees when determining promotions for hourly and salaried positions. It is therefore **ORDERED** as follows:

### **I. Injunctive Provisions**

#### A. Ombudsperson

##### 1. Appointment of Ombudsperson

- a. The Court appoints Tony P. Rosenstein to serve as an outside Ombudsperson to monitor compliance with this Injunction and to hear complaints from class members regarding matters described in Section II.A.2.a. below. Mr. Rosenstein has read and signed the attached Scope and Limits of Appointment as Ombudsperson. The court is satisfied that his appointment will adequately safeguard the judicial process.
- b. Lufkin shall be responsible for the prompt payment of reasonable fees and expenses the Ombudsperson incurs in connection with his duties and

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<sup>1</sup> Lufkin's agreement with this Injunctive Relief is limited to form only and does not waive any arguments with respect to the statute of limitations, liability or appropriateness of injunctive relief.

responsibilities under this Order. The Ombudsperson shall provide an invoice detailing his time spent and expenses incurred to Lufkin with each request for payment.

2. Duties and Responsibilities of the Ombudsperson

a. Complaint Investigation

- i. The Ombudsperson shall have the authority to receive, investigate, provisionally determine and recommend measures to resolve the following types of complaints: (1) complaints from Lufkin employees regarding Lufkin's non-compliance with this injunction, (2) complaints from black employees regarding promotion and promotion related discrimination, and (3) complaints of retaliation from employees who allege that they have been retaliated against for making a complaint regarding non-compliance with a specific mandate of this injunction or a promotion-related matter to the Ombudsperson, Lufkin or one of the unions representing Lufkin's employees.
- ii. Lufkin and its officers, agents, managers and supervisors shall not engage in or be a party to any act, policy, practice or procedure that discriminates or retaliates against (1) any employee of Lufkin who, in good faith, contacts the Ombudsperson regarding Lufkin's alleged non-compliance with this injunction; (2) any black employee who, in good faith, contacts the Ombudsperson with regard to alleged

promotion and promotion related discrimination; and (3) anyone who, in good faith, contacts the Ombudsperson regarding complaints of alleged retaliation for making a complaint regarding non-compliance with a specific mandate of this injunction or a promotion-related matter to the Ombudsperson, Lufkin or one of the unions representing Lufkin's hourly employees.

- iii. In giving the Ombudsperson this authority, the Court does not intend for him to displace the unions' statutory obligation to represent Lufkin's hourly employees or to provide a substitute for the grievance processes set forth in the collective bargaining agreement.
- iv. Lufkin shall provide to its employees in writing a toll free number that employees can use to contact the Ombudsperson and other information as provided for in Section II.H.2. below and in Appendix 1 to this Order.
- v. In order to investigate any complaint, the Ombudsperson shall have the authority to conduct additional fact finding which may include requesting documents or other information from Lufkin and interviewing employees, supervisors or other Lufkin personnel. The Ombudsperson shall also have the authority to take such actions as appropriate to assist the resolution of the complaint, including recommending appropriate corrective action to Lufkin. If the Ombudsperson concludes after investigation that Lufkin has not

complied with the injunction or has engaged in promotion related discrimination or retaliation, the Ombudsperson shall request that Lufkin take recommended remedial action and in the absence of such action report the matter to the Court and Class Counsel.

3. Monitoring

- a. The Ombudsperson shall be responsible for monitoring Lufkin's implementation of, and compliance with, this Order and any other subsequent or superseding remedial orders of the Court. In connection with this responsibility, the Ombudsperson shall have the authority to:
  - i. Review any documents maintained by Lufkin as described in Section II.E. below;
  - ii. Audit Lufkin's promotion procedures, practices and related-decisions;
  - iii. Conduct independent analyses of data related to Lufkin's promotion procedures, practices and related-decisions;
  - iv. Request additional information and data from Lufkin in order to carry out his audit and/or independent analyses of Lufkin's promotion procedures, practices and related-decisions.
  - v. Confer with Lufkin's Internal Monitor selected pursuant to Section II.G. below, and other Lufkin managers for the purpose of reviewing with them Lufkin's implementation of, and compliance with, this

Order and any other subsequent or superseding remedial orders of the Court.

- vi. Receive information from, and confer with, Class Counsel or Lufkin's counsel regarding Lufkin's implementation of, and compliance with, this Order and any other subsequent or superseding remedial orders of the Court.

4. Reporting

- a. The Ombudsperson shall report quarterly to the Court with respect to (1) any complaints requiring remedial action and the action taken thereon by Lufkin, and (2) Lufkin's compliance with the Promotion Procedures set forth in Section II.B. below.
- b. Class Counsel and Lufkin's counsel shall be given a copy of these reports and an opportunity to confer and respond at least five (5) days prior to filing with the Court.
- c. The unions' counsel shall be given a copy of any reports that document promotion-related complaints made by hourly employees.

B. Compliance with Promotion Procedures

1. Lufkin shall comply with the following Promotion Procedures for employees assigned to its facilities in Angelina County, Texas, until further order of the Court as provided in Section III or the expiration of this Injunction.
2. For purposes of this order,

- a. “Bidder” means an employee who places, and does not withdraw, his or her name on a bid posted pursuant to Article 25, Section 1 of the 2008-2011 Master Collective Bargaining Agreement and/or any similar provision of any amended or subsequent collective bargaining agreement between Lufkin and its unions (hereafter “Master CBA”).
- b. “Career Path” means those jobs set forth in Appendix 2.
- c. “Departmental Seniority” is as defined in the Master CBA, Article 22, Section 1(b).
- d. “Eligible Employee” means:
  - i. For hourly job classifications on the IAM machining seniority roster and in the IAM Assembly and Distribution career paths on the Assembly and Shipping Department seniority roster, an Eligible Employee is an employee seeking to move:
    - 1) Within the employee’s current career path on a seniority roster for which the employee has Departmental Seniority into an hourly job classification which has a maximum rate of pay greater than the maximum rate of pay for the employee’s current job classification; or
    - 2) Into a different career path than the employee’s current career path for which the employee has Departmental Seniority on the seniority roster for the job classification into which the employee is seeking to move.

- ii. In addition to sub-sections (i) (1) and (2) above, an Eligible Employee is an employee in the Machinist or Shaft Finisher job classification who has Departmental Seniority on the seniority roster for the hourly job classification he is seeking and he is exercising his rights under IAM Letter of Stipulation No. 2.
- iii. For hourly job classifications on all seniority rosters other than the IAM machining seniority roster including movements from job classifications in the Assembly or Distribution career paths not addressed in subsection (i) above, an Eligible Employee is an employee seeking to move from:
  - 1) An hourly job classification not in a Line of Progression into an hourly job classification that (a) is on a seniority roster for which the employee has Departmental Seniority or is permitted to bid on pursuant to GMP Letter of Stipulation No. 22 and (b) has a greater maximum rate of pay than the employee's current hourly job classification;
  - 2) An hourly job classification not in a Line of Progression into an hourly job classification that is in a Line of Progression, that (a) is on a seniority roster for which the employee has Departmental Seniority or is permitted to bid on pursuant to GMP Letter of Stipulation No. 22 and (b) the highest hourly job classification in such Line of Progression, has a greater



maximum rate of pay than the employee's current job classification;

- 3) An hourly job classification that is in a Line of Progression into an hourly job classification that: (a) is on a seniority roster for which the employee has Departmental Seniority or is permitted to bid on pursuant to GMP Letter of Stipulation No. 22 and (b) has a greater maximum rate of pay than the maximum rate of pay for the highest job classification in the employee's current Line of Progression; or
- 4) An hourly job classification that is in a Line of Progression into an hourly job classification that is in a different Line of Progression (the "Receiving Line of Progression"), that (a) is on a seniority roster for which the employee has Departmental Seniority or is permitted to bid on pursuant to GMP Letter of Stipulation No. 22 and (b) the highest hourly job classification in the Receiving Line of Progression has a greater maximum rate of pay than the maximum rate of pay for the highest hourly job classification in the employee's current Line of Progression.

- iv. In addition to sub-sections (iii) (1) and (2) above, an Eligible Employee is an employee in the Chip-Grind Finish job classification who has Departmental Seniority on the seniority roster for the hourly

job classification he is seeking and he is exercising his rights under GMP Letter of Stipulation No. 19.

- e. “Line of Progression” means:
    - i. For the Fabrication Department: Parts Finisher, Structural Worker, Fork Lift, and Inspector lines;
    - ii. For the Foundry Department: the Core Machine Operator, Molding Machine Operator, Welder, Electrician, Mechanic (Class B to Master Maintenance Specialist), and Fork Lift lines; and
    - iii. For the Pattern Shop Department: the Pattern Maker and Pattern Tender lines.
  - f. “Subordinate Job Classification” means a job classification that an employee is required to hold before promotion to a higher hourly job classification.
3. For promotions to the hourly job classifications set forth in Appendix 3, Lufkin shall offer the promotion to the Eligible Employee Bidder with the highest Departmental Seniority. If that bidder declines the promotion, Lufkin shall offer the position to the Eligible Employee Bidder with the next highest Departmental Seniority until all Eligible Employee Bidders have been offered the promotion. If no Eligible Employee Bidder accepts the position, the position may be filled pursuant to the Master CBA. Lufkin shall post the name of the Eligible Employee Bidder who is awarded the promotion on the main bulletin board for the applicable department.
4. For promotions to the hourly job classifications set forth in Appendix 4 and 4a, Lufkin shall offer the promotion to the Eligible Employee Bidder with the highest

Departmental Seniority who has passed the applicable test or skill demonstration as set forth in Appendix 4 or as provided for in Section II.C.3. below. If that bidder declines the promotion, Lufkin shall offer the position to the Eligible Employee Bidder with the next highest Departmental Seniority who has passed the applicable test or skill demonstration until all Eligible Employee Bidders passing the applicable test or skill demonstration have been offered the promotion. If no Eligible Employee Bidder accepts the position, the position may be filled pursuant to the Master CBA. Lufkin shall post the name of the Eligible Employee Bidder who is awarded the promotion on the main bulletin board for the applicable department.

5. For promotions to the Crane Operator or Hydraulic Manipulator Operator job classifications in the Foundry Department, Lufkin shall promote the employee in the Learner job classification for the position with the highest Departmental Seniority provided the employee has completed a minimum of ninety (90) days service in the Learner job classification for the position. In order to be promoted to Crane Operator, the employee must also successfully complete the Crane Operator Learner Task Proficiency Check Off list, attached as Exhibit 5. If the employee in the Learner classification for the position does not have the requisite ninety (90) days service in the Learner job classification, Lufkin shall promote the employee in the Learner job classification with the next highest Departmental Seniority who meets the minimum ninety (90) days service in the Learner classification for the position.
6. For promotions to the hourly job classifications set forth in Appendix 6, Lufkin shall offer the promotion to the Eligible Employee Bidder with the highest Departmental

Seniority who has at least ninety (90) days service in the Subordinate Job Classification and meets the other criteria as set forth in Appendix 6. If that bidder declines the position, Lufkin shall offer the position to the Eligible Employee Bidder with the next highest Departmental Seniority who has at least ninety (90) days service in the Subordinate Job Classification until all Eligible Employee Bidders with ninety (90) days service in the Subordinate Job Classification have been offered the promotion. If no employee in the Subordinate Job Classification has bid for the position or has the requisite length of service, Lufkin may treat the posting as a bid for the Subordinate Job Classification and award the promotion to the Eligible Employee Bidder with the highest Departmental Seniority or elect to hire for the position. If Lufkin elects to offer the Subordinate Job Classification to the Eligible Employee Bidder and that bidder declines the position Lufkin shall offer the position to the Eligible Employee Bidder with the next highest Departmental Seniority until all Eligible Employee Bidders have been offered the promotion to the Subordinate Job Classification. If no Eligible Employee Bidder accepts the position, the position may be filled pursuant to the Master CBA consistent with the provisions of this Order. Lufkin shall post the name of the Eligible Employee Bidder who is awarded the promotion on the main bulletin board for the applicable department.

7. For promotions to the Melter A job classification, Lufkin shall promote the employee in the Melter B job classification with the highest Departmental Seniority provided the employee has passed the Melter A test and demonstrated ability as set forth in the Melter A demonstration standards attached as Appendix 7.

8. For promotion to the job classification Machinist (for gear hobs and grinders), as provided in IAM Letter of Stipulation No. 5, Lufkin shall offer the promotion to Sykes generator operators in order of Departmental Seniority and if none accept the promotion shall post and award the position as provided in paragraph 3 above.
9. For promotion to the hourly job classifications set forth in Appendix 8:
  - a. If the Eligible Employee Bidder who is awarded the promotion is moving in the same career path and his current rate of pay is less than the maximum rate of pay for the Trainee job classification, he shall be classified initially in the Trainee job classification within the career path.
  - b. If the Eligible Employee Bidder who is awarded the promotion is moving in the same career path and his current rate of pay is higher than the maximum Trainee job classification rate of pay, he shall be placed in the job classification on which he bid.<sup>2</sup>

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<sup>2</sup> For example, an Eligible Employee Bidder classified as a Machine Operator Class C earning \$ 14.49 per hour, who in 2009, accepts Lufkin's offer of a Machine Operator Class A position will initially be classified as a Machine Operator Trainee because the 2009 maximum rate of pay for Machine Operator Trainee is greater than the employee's current rate of pay. If the Machine Operator Class C was earning \$15.88 per hour at the time of his successful 2009 bid, he would be classified as a Machine Operator Class A because his current rate of pay is greater than the current maximum rate of pay for the Machine Operator Trainee classification.

- c. If the Eligible Employee Bidder who is awarded the promotion is moving into a different career path, he will be classified initially in the Trainee classification at the minimum hourly rate for the Trainee classification.<sup>3</sup>
  - d. Lufkin shall post the name of the Eligible Employee Bidder who is awarded the promotion on the main bulletin board for the applicable department.
10. For promotions to the hourly job classifications set forth in Appendix 9, Lufkin shall review and analyze the promotions, including the person who was promoted to the position, all persons offered but declining the position and all other persons qualified for the promotion by race on an annual basis and provide its written assessment and the underlying data used to make its assessment to the Ombudsperson. If the Ombudsperson determines that there is a racially disparate pattern in the promotions adverse to black employees, he shall review the promotion decisions that have been made in light of the requirements of the job and, if warranted, recommend remedial action to Lufkin. If Lufkin declines to implement such remedial action, the Ombudsperson shall report his findings, proposed remedial action and Lufkin's response to the Court, Lufkin and Class Counsel. Lufkin shall retain the right to defend against implementation of the recommended remedial action, including on the ground that the racial disparities found by the Ombudsperson were not statistically significant or, in light of the job's requirements, valid criteria were used

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<sup>3</sup> For example, an Eligible Employee Bidder who is in a Class II Assembler position at the time he accepts in 2009, Lufkin's offer of a Machine Operator Class A position will initially be classified as a Machine Operator Trainee and paid \$12.19 per hour, which is the 2009 minimum rate of pay for the Trainee classification.).

to make the promotion decisions. For purposes of this sub-section “other persons qualified for the promotion” means persons: (a) in the Subordinate Job Classification if the promotion is within a career path or into a specialist or master position or (b) in the Machine Operator A job classification if the promotion is to Machinist.

11. For job classifications in a career path, Lufkin shall retain all records and data necessary to analyze and shall analyze on an annual basis to determine whether there are any racial disparities in (a) the length of time in which discretionary merit and other pay increases are awarded to employees in Trainee classifications, for which such discretionary merit and other pay increases are provided for by the Master CBA and (b) the length of time employees spend in Trainee classifications before they are promoted out the of the classification. Lufkin shall report these analyses to the Ombudsperson. If the Ombudsperson determines that there is a racially disparate pattern with respect either to the time to pay increases or promotion from the trainee classification adverse to black employees, he shall investigate to determine the causes of such disparities and, if warranted, recommend remedial action to Lufkin. If Lufkin declines to implement such remedial action, the Ombudsperson shall report his findings, proposed remedial action and Lufkin’s response to the Court, Lufkin and Class Counsel. Lufkin shall retain the right to defend against implementation of the recommended remedial action, including on the ground that the racial disparities found by the Ombudsperson were not statistically significant or valid criteria were used for making the decisions.

C. Testing Protocols

1. Lufkin shall comply the testing protocol described in Appendix 10 in its administration of any tests or skill demonstrations it uses for determining promotions to any of the jobs listed in Appendices 4, 5 and 7 or to be developed pursuant to Section II.C.3. below.
2. Lufkin shall analyze the results of each paper and pencil test and skill demonstration it administers by the race of the persons who take, pass and fail the test or skill demonstration and provide its written analysis and the underlying data used to conduct the analysis to the Ombudsperson. If the Ombudsperson determines there is a racially disparate pattern in the passing rate for such test or skill demonstration adverse to black employees, he shall review the job, the test, and the degree of the disparate pattern to determine whether to require Lufkin to validate the test or skill demonstration and if so, recommend such validation, including determining whether there is another suitable test or skill demonstration that has less adverse impact. If Lufkin declines to follow the Ombudsperson's recommendation, the Ombudsperson shall report his findings, the recommended remedial action and Lufkin's response to the Court, Lufkin and Class Counsel. Lufkin shall retain the right to defend against implementation of the recommended remedial action, including on the ground that the racial disparities found by the Ombudsperson were not statistically significant or that the test or skill demonstration is valid.
3. If during the term of this Order, Lufkin has a need to develop a test or skill demonstration for any of the job classifications listed on Appendix 4a, or any newly



established or changed job classifications, Lufkin shall provide copies of the test or outline of the skill demonstration to the Ombudsperson and Class Counsel at least fourteen (14) days prior to Lufkin's commencement of use of the test or skill demonstration. Class Counsel may provide comments on the test or skill demonstration to the Ombudsperson and Lufkin.

D. Manager Training

1. Initial Training

- a. Within thirty (30) days of the entry of this injunction, Lufkin shall provide Initial Training to all of its officers, executives, managers and supervisors in Angelina County on the terms of this Injunction including the promotion and testing procedures.
- b. Lufkin's counsel or a member of Lufkin's management who is knowledgeable about this litigation will provide the Initial Training.
- c. Lufkin shall provide such Initial Training to all new officers, executives, managers and supervisors in Angelina County, who have not previously received the Initial Training, within thirty (30) days of their hire or promotion.

2. Other Manager Training

- a. Lufkin shall engage the services of Dr. Winfred Arthur to develop and provide live training for its officers, executives, managers and supervisors that addresses the Court's liability findings and reduction of subjectivity in decision making in the workplace. Dr. Arthur shall advise Lufkin on the

appropriate specific content of the training and written materials to provide to trainees. Training for officers, executives and managers shall be a one day program and for supervisors a half day program.

- b. Lufkin shall provide this training within one hundred eighty (180) days of the date of entry of this Order.
- c. Lufkin shall provide similar training in videotape format to any newly hired or promoted officers, executives, managers and supervisors (who have not previously received the training) within thirty (30) days of their hire or promotion.
- d. Lufkin shall provide written verification to the Ombudsperson of the completion of the training and that all of its officers, executives, managers and supervisors received such training.

E. Recordkeeping

1. Lufkin shall maintain paper and data records that reflect promotion-related decisions including bid sheets, postings and other written communications reflecting employee interest in promotions, forms documenting decisions, structured interview questions and responses, data analyses, paper and pencil tests, records of skill tests, job descriptions for salaried jobs, formal training, and all documentation pertaining to any internal employee complaints, including but not limited to, union grievances, arising from promotion-related decisions and the investigation and resolution of such complaints.
2. Lufkin shall retain such documents, records and data for the duration of this Order.

F. Annual Executive EEO Updates

- a. Lufkin's Internal Monitor will prepare an Annual Executive Report for Lufkin's executive team.
- b. For purposes of this Order, Lufkin's "executive team" means officers of the Company.
- c. The Annual Executive Report shall contain, as a minimum, summaries of any adverse impact analysis of promotions that has been provided to the Ombudsperson, and any reports provided by the Ombudsperson to the Court. Copies of any analyses or reports referred to in the Annual Executive Report will be attached to the report.
- d. A copy of this Report shall be concurrently provided to the Ombudsperson, who may submit comments or recommendations based on the Report, in which case such comments or recommendations shall also be provided to, and reviewed by, the executive team.

G. Internal Monitoring

1. Within fourteen (14) days of entry of this Injunction, Lufkin shall designate an Internal Monitor. At the same time, Lufkin shall advise the Court, the Ombudsperson and Class Counsel of the identity of the Internal Monitor.
2. The Internal Monitor shall be responsible for the following:
  - a. Monitoring Lufkin's compliance with the terms of this Injunction and coordinating with the Court-appointed Ombudsperson.

- b. Monitoring Lufkin's compliance with the promotion and testing procedures, training procedures, data analyses, recordkeeping and reporting required by this Injunction.
- c. Serving as Lufkin's liaison with the Ombudsperson and responding to any requests for information from the Ombudsperson.
- d. Overseeing the preparation of and submitting quarterly reports to the Ombudsperson which will include data on all promotions awarded in the prior quarter. This data will include the name of each person who was promoted, their race, the position from which they were promoted, the position to which they were promoted, as well as the name, race, and classification of each unsuccessful candidate for the promotion.
- e. Conducting an adverse impact analysis of Lufkin's promotion data every six months to determine if there are any statistically significant shortfalls in promotions of black employees not the product of a bona fide seniority system.
- f. Reporting to Lufkin's Chief Executive Officer and senior management staff regarding Lufkin's implementation of, and compliance with, the Court's remedial orders and concurrently sending a copy of such report to the Ombudsperson.
- g. Conducting and reporting to the Ombudsperson the annual analyses required under Sections II.B.10. and 11. and II.C.2. of this Order.

- h. Preparing the Annual Executive Report required under Section II.F. of this Order.

#### H. Communications

1. Lufkin shall provide a copy of this Injunction to all officers, executives, supervisors and managers as part of the Initial Training required under Section II.D.1. of this Order. Lufkin shall also provide copies of any subsequent remedial orders of the Court modifying or amending this Order to its officers, executives, supervisors and managers, and to the unions.
2. Within fourteen (14) days of the entry of this Injunction, Lufkin shall provide to all employees a copy of the notice attached as Appendix 1 which summarizes the terms of this injunction and identifies the Ombudsperson, explains his role, and provides a phone number and other contact information for him.

### **II. Jurisdiction**

This court specifically retains jurisdiction to enforce this permanent injunction.

### **III. Modification of this Order**

In the event that changed or other circumstances make a modification of this Order necessary to ensure its purposes are fully effectuated, the parties shall attempt in good faith to reach agreement on such modification suitably tailored to the changed or other circumstance, including by conferring with one another and the Ombudsperson, and submit the modification to the Court by stipulation. If the parties are not able to reach such agreement, any party may move the Court to modify the Order.

**III. Term of this Order**

**This Order shall remain in effect for five (5) years from the date of its entry.**

So **ORDERED** and **SIGNED** this **18** day of **December, 2009**.



---

Ron Clark, United States District Judge

APPENDIX 1

[LUFKIN INDUSTRIES LETTERHEAD]

**NOTICE TO ALL LUFKIN INDUSTRIES EMPLOYEES IN ANGELINA COUNTY**

In August 2005, the United States District Court for the Eastern District of Texas found that Lufkin Industries' exercise of discretion in promotion-related practices had a discriminatory impact on its black employees in Angelina County. In order to ensure that this discriminatory impact on black employees is eliminated, the Court has entered an injunction against Lufkin requiring Lufkin to:

- Clarify its promotion-related practices to curtail subjectivity.
- When tests or skill demonstrations are required for promotions, administer the tests and skill demonstrations according to a written protocol. Any employee may request a copy of this protocol from Lufkin's human resources department.
- Train all supervisors and managers on the promotion-related procedures and equal employment opportunity.
- Keep documents related to every promotion-related decision so that they can be reviewed if a promotion-related decision is challenged.
- Review and analyze promotion-related decisions periodically to ensure that its procedures are followed and that black employees are not adversely affected by excessive subjectivity in the promotion process.

The Court has appointed \_\_\_\_\_, a Houston attorney, as an outside ombudsperson to monitor Lufkin's compliance with this injunction and to receive, investigate and recommend resolution for certain kinds of complaints from Lufkin employees. Black employees may complain to \_\_\_\_\_ regarding what they believe to be promotion and promotion related discrimination. Any employee who believes Lufkin has failed to comply with the Court's injunction or who believes he/she may have been retaliated against for complaining to \_\_\_\_\_, may also complain to \_\_\_\_\_ at the telephone number below.

\_\_\_\_\_ **(Ombudsperson) 1-800-**\_\_\_\_\_

Employees are not required to complain to \_\_\_\_\_ and may choose instead to complain directly to Lufkin or, if an hourly employee, to one of the unions representing Lufkin's employees at one of the following numbers:

**John Havard (Manager of Human Resources) (936)637-5405**

**GMP Local 429** \_\_\_\_\_

**Boilermakers Local 587** \_\_\_\_\_

**IAM Local 1999** \_\_\_\_\_

Lufkin will not retaliate against any employee who makes a complaint to \_\_\_\_\_,  
Lufkin Industries or to one of the unions.



**APPENDIX 2**

**Career Paths**

**Machine Shop Department roster**

**Assembly**

Master  
Commercial Gear Assembly  
Welder  
IGBW  
Class A  
Trainee  
Helper

Class I  
Class II  
Trainee  
Helper

Finish Painter  
Spray Painter

**Distribution**

Specialist  
Handler  
Trainee  
Truck-Trailer Operator

**Heat Treat**

Master Heat Specialist  
Master Heat Treater  
Heat Treater  
Heat Treat Trainee

**Machining**

Inspector Specialist  
Inspector  
Machinist  
Machine Operator Class A  
Machine Operator Class B  
Machine Operator Class C  
A B C Tool Room  
Machinist Helper  
Shaft Finisher  
Master Tool Maker  
Tool Maker  
Tool Grinder Class A  
Electrical Department Specialist  
Electrician Class A  
Electrician Class B  
Electrician Class C  
Electronics Technician  
Electronics Trainee

**APPENDIX 2**

**Career Paths**

Master Maintenance Specialist  
Maintenance Mechanic specialist  
Maintenance Mechanic Class A  
Maintenance Mechanic Class B  
Maintenance Mechanic Class C  
Pipe Fitter Class A  
Pipe Fitter Class B  
Pipe Fitter Class C  
Utility Maintenance Class A

**Assembly and Shipping roster**

**Assembly**

Class I  
Class II  
Trainee  
Helper

**Distribution**

Specialist  
Handler  
Trainee

**APPENDIX 3**

Burner  
Casting Finisher  
Casting Painter  
Cleaning Machine Operator  
Core Mold Finisher  
Crane Operator Learner  
Drill Press Operator  
Forklift Casting Handler  
Forklift Specialist  
Forklift Tow Motor Operator  
Grit Blast Operator  
Hydraulic Manipulator Op Learner  
Main Bay Mold Closer  
Mullor Operator Class A  
Rod Bender  
Sand Reclaimer Operator  
Shakeout Operator  
Pattern Maker Apprentice  
Pattern Tender Class B  
Belt Cover/Crank Guard Builder  
PT Burner  
Burner Class B  
Crane Operator  
Fork Lift Operator  
Grinder Structural  
Inspector  
Machine Operator Structural IV  
Sheet Metal Worker  
Parts Finisher B  
Storekeeper  
Structural Worker B  
Truck Trailer Operator  
PT Assembler CI A  
OF Assembler CI II  
Spray Painter  
Distribution Handler  
Heat Treater  
Inspector  
Machinist (for PT/OF designated machines)  
Machine Operator CI A  
Machine Operator CI B  
Machine Operator CI C  
Shaft Finisher  
Tool Maker  
Tool Grinder Class A  
Truck Trailer Operator  
Utility Maintenance CI A  
Assembler Class II  
Distribution Handler  
Crane Operator  
Crane Operator (Mobile)

**APPENDIX 3**

**Fork Lift Operator  
Inspector  
Spray Painter  
Painter/Cleaner  
Truck Trailer Operator**

## MACHINES THAT ARE CLASSIFIED AS MACHINIST MACHINES

9/29/09

<b>POWER TRANSMISSION</b>			
<b>Machine Number</b>	<b>Machine Description</b>	<b>Actual Work Center</b>	<b>Generic Work Center</b>
M00269	Manual Hob	246	106640
M00246	Manual Hob	246	106640
M00305	Manual Hob	246	106640
M00477	Manual Hob	246	106640
M09345	Manual Hob	477	106640
M00304	Manual Hob	477	106640
M00289	Manual Hob	292	106640
M00096	Small Manual Hob	289	106640
M09522	Small Manual Hob	223	106640
M09521	CNC Hob	291	106640
M09259	CNC Hob	291	106640
M09520	CNC Hob	291	106640
M09523	CNC Hob	291	106640
M12041	CNC Hob	291	106640
M09631	CNC Hob	291	106640
M08703	Gear Grinder	504	106640
M09630	Gear Grinder	504	106640
M09362	Gear Grinder	506	106640
M04219	Gear Grinder	506	106640
M05815	Gear Grinder	506	106640
M00595	Gear Grinder	506	106640
M11419	Gear Grinder	507	106640
M01501	Gear Grinder	508	106640
M00506	Gear Checker	923	106640
M00048	Gear Checker	923	106640
M00288	Lapper	048	106640
M09417	Lapper	048	106640
M09416	Lapper	048	106640
M04934	Lapper	048	106640
M00195	Press	134	106657
M00212	Engine Lathe	185	106657
M005199	Press	212	106657
M006168	Engine Lathe	225	106657
M0012125	Integrex 70Y	323	106657
M004708	Integrex E650H	323	106657
M09499	CNC Grinder	344	106657
M00573	Engine Lathe	460	106657
M006437	Engine Lathe	460	106657
M00397	Integrex 50Y	463	106657

**MACHINES THAT ARE CLASSIFIED AS MACHINIST MACHINES**

9/29/09

M00500	Engine Lathe	500	106657
M00382	Engine Lathe	500	106657
M08072	Engine Lathe	500	106657
M00276	Horizontal Boring Mill	075	106648
M00423	Horizontal Boring Mill	276	106648
M00538	Horizontal Mach Center	423	106648
M00539	Horizontal Mach Center	423	106648
M00750	Horizontal Mach Center	423	106648
M00750	Horizontal Mach Center	750	106648
	Horizontal Boring Mill	750	106648
<b>OILFIELD</b>			
<b>Machine Number</b>			
<b>Machine Description</b>			
M11349		<b>Actual Work Center</b>	<b>Generic Work Center</b>
M00468	G & L Hhs/Cov Machining Cntrs	236	102
M00469	G & L Hhs/Cov Machining Cntrs	236	102
	G & L Hhs/Cov Machining Cntrs	236	102
M10190			
M11350	G & L Machining Cntrs	239	102
	G & L Machining Cntrs	239	102

**APPENDIX 4**

Casting Inspector	Casting Inspector Test	Foundry
Core Gating Assembler	Core Gating Assembler Test	Foundry
Core Machine Operator CI B	Core Machine Operator B Test	Foundry
Coresetter	Coresetter Test	Foundry
Coreless Furnace Operator	Coreless Furnace Operator Test	Foundry
Cupola Operator	Cupola Operator Test	Foundry
Foundry Process Inspector	Foundry Process Inspector Test	Foundry
Melter Class B	Melter B Test	Foundry
Molding Machine Operator B	Molding Machine Operator B Test	Foundry
Shipping/Receiving Operator	Shipping/Receiving Test	Foundry
Storekeeper	Storekeeper Test	Foundry
Welder Class B	Welder B Test	Foundry
Electronics Technician	Electronics Technician Test	Foundry
Foundry Mechanic Class A	Mechanic Class A Test	Foundry
Foundry Mechanic Class A	Vehicle Maintenance Test	Foundry
Maintenance Storekeeper	Maintenance Storekeeper Test	Foundry
Maintenance Helper	Maintenance Helper Test	Foundry
Flask Repairman	Flask Repairman Test	Foundry
Pattern Maker Class B	Pattern Maker Class B Test	Foundry
Pattern Masker Class A	Pattern Maker Class A demonstration	Foundry
Hot Gear Welder	Hot Gear Welder & Demonstration	Fabrication
Welder Class A	Welder A Test	Fabrication
Maintenance Mechanic Structural	Maintenance Mechanic Structural Cl. A Test	Fabrication
Electronics Technician	Electronics Technician Test	Power Transmission
Maintenance Mechanic CL A	Maintenance Mechanic CL A test	Power Transmission
Electronics Technician	Electronics Technician Test	Assembly and Shipping
Maintenance Mechanic CI A	Maintenance Mechanic CI A Test	Assembly and Shipping

## APPENDIX 4a

Electrician Class A	Foundry
Electrician Class B	Foundry
Foundry Mechanic Class B	Foundry
HVAC Specialist	Foundry
Electrician Class A	Machining
Electrician Class B	Machining
Electrician Class C	Machining
Maintenance Mechanic CL B	Machining
Maintenance Mechanic CL C	Machining
Electrician Class A	Assembly and Shipping
Electrician Class B	Assembly and Shipping
Electrician Class C	Assembly and Shipping
Maintenance Mechanic CI B	Assembly and Shipping
Maintenance Mechanic CI C	Assembly and Shipping
Pipefitter Class A	Assembly and Shipping
Pipefitter Class B	Assembly and Shipping
Pipefitter Class C	Assembly and Shipping
Maintenance Mechanic CI B	Fabrication
PT Welder	Machining
PT Finish Painter	Machining
Pipefitter Class A	Machining
Pipefitter Class B	Machining
Pipefitter Class C	Machining



APPENDIX 5

Employee Name & Clock #: \_\_\_\_\_

**Crane Operator Learner  
Task Proficiency Check Off**

**LCF Operations**

- 1. Movements
  - a. Adequate speed at setting up flask \_\_\_\_\_
  - b. Adequate speed at stripping molds from pattern \_\_\_\_\_
  - b. Efficiency of movements (I.E. unnecessary trips) \_\_\_\_\_
  
- 2. Distance Judging
  - a. Positioning block over pattern & molds \_\_\_\_\_
  - b. Rolling mold over to be set on floor \_\_\_\_\_
  - c. Transferring mold & flask over ground objects \_\_\_\_\_
  
- 3. Following Hand signals of ground crew \_\_\_\_\_
  
- 4. Safety
  - a. Prevention of "Side Loading" crane \_\_\_\_\_
  - b. Avoidance of taking load over ground personnel \_\_\_\_\_
  - c. Ability of keeping proper tension on chains while mold is being shaken on shakeout deck. \_\_\_\_\_
  - d. Prevention of overloading crane \_\_\_\_\_

Other comments \_\_\_\_\_

LCF Supervisor \_\_\_\_\_

Date Training Complete \_\_\_\_\_

Hours spent training in this Facility \_\_\_\_\_

Employee Name & Clock #: \_\_\_\_\_

### Crane Operator Learner Task Proficiency Check Off

**MAIN BAY**

**Coreup and Closeup**

- 1. Visual depth perception
  - a. Depth perception at centering block over a point to be cored \_\_\_\_\_
  - b. Depth perception at centering block to close up a mold \_\_\_\_\_
  - c. Depth perception at centering flask on pattern \_\_\_\_\_
  - d. Depth perception at centering block to draw mold from pattern \_\_\_\_\_
  
- 2. Ability to follow hand signals from ground crew \_\_\_\_\_
  
- 3. Precision of movements
  - a. Ability to control necessary slight movements of all crane motions \_\_\_\_\_
  - b. Ability to "spot" loads in exact locations as directed by ground crew \_\_\_\_\_
  
- 4. Safety
  - a. Prevention of "Side Loading" crane \_\_\_\_\_
  - b. Avoidance of taking load over ground personnel \_\_\_\_\_
  - c. Prevention of overloading crane \_\_\_\_\_

Other Comments \_\_\_\_\_

\_\_\_\_\_  
Molding Supervisor \_\_\_\_\_

Date Training Complete \_\_\_\_\_

Hours spent training in this Facility \_\_\_\_\_

Employee Name & Clock #: \_\_\_\_\_

### Crane Operator Learner Task Proficiency Check Off

#### Melting Department

1. Charging Melt operations
  - a. Knowledge of material and ingredient numbers \_\_\_\_\_
  - b. Judgement of proper magnet load to meet final scale amount \_\_\_\_\_
  - c. Adequate speed & proficiency to accomplish required task \_\_\_\_\_
  
2. Tapping Ladles
  - c. Distance judging as ladle approach's source to be tapped \_\_\_\_\_
  - d. Anticipation and reaction to ladle height adjustment requirements as ladle is being filled from tap. \_\_\_\_\_
  - e. Safe handling of full ladle and ability to set full ladle down safely \_\_\_\_\_
  
3. Pouring Ladles
  - a. Safety in handling ladle full of iron ( avoidance of ground personnel, ability to prevent ladle from swinging, avoidance of bumping ladle wheel, etc) \_\_\_\_\_
  - b. Precision in positioning ladle lip over down sprue of mold. \_\_\_\_\_
  - c. Ability to follow hand signals from ground crew \_\_\_\_\_
  - d. Anticipation of the need to move as iron is being poured \_\_\_\_\_
  - e. Delicacy of small movements to keep ladle in proper position \_\_\_\_\_
  - f. Minimum splash and spill due to improper positioning(quick actions) \_\_\_\_\_
  
4. Safety
  - a. Prevention of "Side Loading" crane \_\_\_\_\_
  - c. Prevention of overloading crane \_\_\_\_\_

Other comments \_\_\_\_\_

Melting Supervisor \_\_\_\_\_

Date Training Complete \_\_\_\_\_

Hours spent training in this Facility \_\_\_\_\_

**APPENDIX 6**

Core Machine Operator Class A

If no B class signs, hire from outside or take senior eligible bidder and make B class

Molding Machine Operator Class A

If no B class signs, hire from outside or take senior eligible bidder and make B class

Pattern Maker Class A

If no B class signs, hire from outside or take senior eligible bidder and make B class

Welder Class A

Class A demonstration  
Welder A Test

If no B class signs, hire from outside or take senior eligible bidder and make B class

Pattern Tender Class A

If no B class signs, hire from outside or take senior eligible bidder and make B class

Burner Class A

If no B class signs, hire from outside or take senior eligible bidder and make B class

APPENDIX 7

**MELTER-A**

**REFRATORIES**

- 1 Must be able to remove ladle linings, install new castable, and completely make the ladle ready for molten iron.
- 2 Must know how to clean and repair ladles. Must have the understanding of what material is to be used in each area of the ladle, and have the knowledge to determine what will, and will not work when repairing ladles to make the ready for molten iron.
- 3 Must have the knowledge and ability to repair all aspects of the cupola, and have it ready to run a campaign. This includes the interior of the cupola, the tap hole, box, trough, and receiving ladle.
- 4 Must be able to perform all coreless repair work, and have a basic understanding of how the coreless furnaces operate.
- 5 Must have the knowledge the remove and install a lining in a coreless furnace. This will include a basic understanding of the sintering process.

**MELTING**

- 1 Must have a basic understanding of how the cupola melts iron.
- 2 Must have a basic understanding of how the coreless furnace melts iron.
- 3 Should be able to melt white iron when needed. This includes the operation of the VIP furnace, and alloy requirements to make white iron.
- 4 Must know how to operate the cupola charging equipment, and be able to perform the duties to charge the cupola.
- 5 Should know how to check temperatures, electrical readings, and shell temps on the holding furnace. Including an understanding of what KW level is required to effectively hold iron at the desired temperature.
- 6 Should be able to skim and rod the inductor on holding furnaces.

**POURING**

- 1 Must be able to demonstrate the ability to pour iron properly from all melting operations, and all sizes of ladles.
  - 2 *Must be able to inventory the molds available to pour and establish the most efficient ladle quantities with regard to metal type, and temperature requirements.*
  - 3 Must be able to effectively identify alloys, and have enough of an understanding of the process to follow instructions from the lab so that the necessary chemistries are met.
  - 4 Must be able to properly skim a ladle.
  - 5 Must understand our certification requirements, and get test blocks/bars/micros poured as required.
  - 6 Must demonstrate the ability to manage ladles of iron, take, and record all required data in the proper fashion.
- \* Must be able to pass Melter-A written test

**APPENDIX 8**

**Machine Shop Department roster**

**Assembly**

Class A

Class II

Spray Painter

**Distribution**

Handler

**Heat Treat**

Heat Treater

**Machining**

Inspector

Machinist

Machine Operator Class A

Machine Operator Class B

Machine Operator Class C

A B C Tool Room

Shaft Finisher

Tool Maker

Tool Grinder Class A

Electrician Class A

Electrician Class B

Electrician Class C

Electronics Technician

Maintenance Mechanic Class A

Maintenance Mechanic Class B

Maintenance Mechanic Class C

Pipe Fitter Class A

Pipe Fitter Class B

Pipe Fitter Class C

Utility Maintenance Class A

**Assembly and Shipping Department roster**

**Assembly**

Class II

**Distribution**

Handler

**APPENDIX 9**

Cleaning Room Specialist  
Master Foundryman  
Master Melter  
Master Maintenance Specialist  
Master Maintenceman  
Master Mechanic  
Master Pattern Maker  
Fork Lift Specialist  
Inspector Specialist  
Parts Finisher Class A  
Structural Worker Class A  
Master Maintenance Specialist  
Master Mechanic Specialist  
PT Master/OF Master (no longer  
used)  
PT Commercial Gear Assembler

PT IGBW  
OF Assembler Class I  
Distribution Specialist  
Master Heat Specialist  
Master Heat Treater  
Inspector Specialist  
Machinist (Rover)  
Master Tool Maker  
Electrical Department Specialist

Electronics Trainee  
Master Maintenance Specialist  
Maintenance Mechanic Specialist

Assembler Class I  
Distribution Specialist  
Finish Painter  
Electrical Department Specialist

Electronics Trainee  
Master Maintenance Specialist  
Maintenance Mechanic Specialist



APPENDIX 10

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF TEXAS  
LUFKIN DIVISION

SYLVESTER MCCLAIN, on his own  
behalf and on behalf of a class of similarly  
situated persons, et al.,

Plaintiffs,

vs.

LUFKIN INDUSTRIES,

Defendant.

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§

CIVIL ACTION NO. 9:97-CV-063

JUDGE COBB

**DEFENDANT LUFKIN INDUSTRIES INC.'S  
TESTING AND SKILL DEMONSTRATION PROTOCOL**

For those job classifications for which a test or skill demonstration is required for promotion, Lufkin will administer the tests and skill demonstrations according to the following protocol:

**A. Testing**

1. Each test shall be writing. The cover page of each test shall state the following: (a) the job classification for which the test is being administered, (b) the time allowed for completion of the test, (c) the value of each question, (d) the score required to pass (by section if passing specific sections is required), and (e) the test identification number. Attached as Exhibit A are the tests by job classification.

2. Prior to posting a bid, Lufkin will select the test version to be used to test for such bid. All tests administered by Lufkin shall conform substantially without material modification to the tests used in the promotion process for each job classification and attached as Exhibit A. Changes in the order of questions or minor modification in the problems (for example, changes in the numbers used in the addition, subtraction, multiplication and division problems; changes

in fractions used in fraction problems; changes in the readings requested for the ruler or tape measure problems; changes in the symbols, abbreviations and working drawings or blueprints) shall not constitute a material modification of the test instrument.

3. All employees for the same bid will be administered the same test version.

4. Employees bidding to a job classification requiring a test shall first be ranked in Departmental Seniority order. Lufkin will select Eligible Employee Bidders for testing by Departmental Seniority order from the Eligible Employee Bidders and may schedule Eligible Employee Bidders for testing in groups by Departmental Seniority. Lufkin shall administer the test according to this protocol until a sufficient number of Eligible Employee Bidders have passed the test to fill the number of jobs posted or all Eligible Bidders have been tested.

5. Employees to be administered a test will be scheduled to report to Lufkin's Department of Health and Safety for testing. Lufkin shall provide written notice of the test to the bidders to be tested at least two days in advance of the test date. Employees scheduled for testing will be notified at the time of scheduling if calculators may be used during the test. Tests will be administered immediately before or immediately after an employee's shift. If a test is scheduled immediately before an employee's shift, sufficient time should be included in the schedule to allow the employee to review the certification sheet, as described in paragraph 6 below, and to report for work on time after a restroom break. If an employee cannot attend the test on the original scheduled date, the employee shall notify the Department of Health and Safety before the scheduled test and must reschedule a test within two days of the original scheduled date. Only one rescheduling will be allowed. Lufkin shall maintain written records of the scheduling and rescheduling of tests. If an employee does not report for testing as scheduled,

the Department of Health and Safety will make and retain a written record that the employee did not complete the testing process because he did not report on the scheduled date or did not request that the test be rescheduled.

6. Tests will be administered in a room in the Department of Health and Safety or in the Buck Creek facility and under conditions appropriate for testing. Employees reporting for testing will be provided a separate paper on which they will certify, by printed name, clock number and signature, the test identification number of the employee's test. The certification sheet will advise the employee in writing that (1) the employee should not sign or otherwise mark the test with their name, clock number or other identifying information; (2) if the test is timed, that the time will begin when the test paper is opened; (3) that the test monitor may not speak or provide any assistance to the employee during the testing process; (4) that the employee may not communicate with any other person, use any electronic device or use any written material other than the test paper during the testing process or, if applicable to the test, that calculators may be used; (5) that the employee may not leave the room until the test is completed and returned to the test monitor; and (6) if the test is timed, that the test monitor will collect all test papers not previously turned in upon expiration of time. The test administrator shall provide sufficient time for the employee to review the certification sheet and written advisories before giving the instruction that the test may be opened and the test time period begins. Except for tests on for which a calculator may be used, employees will not be permitted to enter the testing room with cell phones, messaging devices or other electronic devices, nor will they have or use any writings or notes during test administration. If an employee is observed using a cell phone or other electronic device (except a calculator when authorized), using any written material other than the test paper, or receiving any assistance during the testing, the test will be immediately

confiscated, marked as “failed for rule violation,” and the employee will be subject to disciplinary action. Test monitors shall monitor compliance with these instructions strictly.

7. Upon completion of testing for each posting, the Health and Safety Department shall send the test papers to the department that posted the job for which employees were tested for scoring and, until the scoring process is completed, shall not report the employees’ names or clock numbers to the test grader or department.

8. The original test papers and a copy of the scoring guide shall be retained by the department for each bid, with a copy of the tests filed in the individual employee’s departmental file, for the longer of the Injunction or as required by law. A summary of the test results (including the races of employees taking the test, the races of employees passing the test, and races of employees failing the test) will be maintained by Lufkin’s Human Resources Department and analyzed on an annual basis to determine whether there are racial disparities in the test results.

9. Employees taking but not passing any test shall be advised in writing that they did not pass the test and that and how they may request to review their graded test. An employee not passing the test may request to view the graded test paper but shall not be allowed to make a copy of the test paper or make notes. An employee not passing a test will not be permitted to take the same test for a period of 6 months.

**B. Skill Demonstrations**

1. Skill demonstrations shall be conducted according to a written outline of the demonstration to be performed. Skill demonstration outlines shall be available upon request to

any employee. Requests for the skill demonstration outline should be directed to Human Resources. Attached as Exhibit B are the skill demonstrations and outlines.

2. Employees seeking promotion to a job classification requiring skill demonstration will be scheduled for a skill demonstration in an appropriate work area. All employees performing a skill demonstration for the same bid will use the same work area.

3. Employees bidding for promotion to a job classification requiring a skill demonstration shall first be ranked in Departmental Seniority order. Lufkin will select for the skill demonstration in Departmental Seniority order from the Eligible Bidders in departmental seniority order. Skill demonstrations shall be administered according to this protocol. If the Eligible Bidder with the highest Departmental Seniority does not pass the skill demonstration, Lufkin will administer the skill demonstration to the next eligible employee in Departmental Seniority order, and will repeat this process until an eligible employee has successfully completed the skill demonstration or all bidders seeking a promotion have been tested.

4. Employees to be administered a skill demonstration will be scheduled to report to the appropriate work area. Lufkin shall provide written notice of the skill demonstration to the bidders to be tested at least two days in advance of the test date. Skill demonstrations will be administered immediately before or immediately after an Employee's shift. If a skill demonstration is scheduled immediately before an employee's shift, sufficient time should be included in the schedule to allow the employee to review the certification sheet, as described in paragraph 5 below, and to report for work on time after a restroom break. If an employee cannot attend the skill demonstration on the date scheduled, the employee shall notify his supervisor before the scheduled time and the skill demonstration will be rescheduled. Employees must

reschedule a skill demonstration within two days of the original scheduled date. Only one rescheduling will be allowed. Lufkin shall maintain written records of the scheduling and rescheduling of skill demonstrations. If an employee does not report for the skill demonstration as scheduled, and has not rescheduled the skill demonstration, the department will make and retain a written record that the employee did not complete the skill demonstration process because he did not report on the scheduled date or did not request that the test be rescheduled.

5. Employees reporting for a skill demonstration will be provided a certification paper on which they will certify, by printed name, clock number and signature, the skill demonstration identification number for the skill demonstration. The certification paper will advise the employee that (1) any time period for completion of the skill demonstration, and if timed, that the time for the skill demonstration will begin when the employee commences work; (2) that the skill demonstration monitor may not speak to or provide any assistance to the employee during the skill demonstration process; (3) that the employee may not communicate with any other person or receive any assistance during the skill demonstration process; (4) that the employee may not leave the work area until the skill demonstration is completed; and (5) if the skill demonstration is timed, the monitor will stop the skill demonstration at the expiration of time. If an employee is observed receiving any assistance during the skill demonstration, the skill demonstration will be immediately terminated, marked as "failed for rule violation," and the employee will be subject to disciplinary action. Monitors shall monitor compliance with these instructions strictly. Skill demonstration monitors shall not provide assistance in the performance of the skill demonstration to the employee, nor shall the monitor engage in any activity that could be distracting to the employee during the skill demonstration.

6. Upon completion of each skill demonstration, if the demonstration is to be graded other than actual determination that the part or assembly operates as specified, skill demonstration materials or parts shall be sent to a scorer without identification of the employee completing the skill demonstration until the scoring process is complete.

7. A copy of the scoring sheet for each skill demonstration shall be retained by the department for each bid, with a copy of the scoring sheet filed in the individual employee's departmental file for the longer of the Injunction or as required by law. A summary of the skill demonstration results (including the races of the employees performing the skill demonstration, the races of the employees passing the skill demonstration, and the races of the employees failing the skill demonstration) will be maintained by Lufkin's Human Resources Department and analyzed on a semi-annual basis to determine whether there are racial disparities in the skill demonstration results.

8. Employees taking but not passing a skill demonstration shall be advised in writing that they did not pass the skill demonstration and that they may review their performance on the skill demonstration with the person who administered the skill demonstration. An employee not passing a skill demonstration will not be permitted to take the same skill demonstration for a period of 6 months.

**\*\*NOT FOR PRINTED PUBLICATION\*\***

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF TEXAS  
LUFKIN DIVISION

SYLVESTER MCCLAIN, on his own behalf §  
and on behalf of a class of similarly situated §  
persons, ET AL., §

*Plaintiffs,* §

v. §

LUFKIN INDUSTRIES INC., §

*Defendant.* §

CIVIL ACTION No. 9:97CV63

JUDGE RON CLARK

**SCOPE AND LIMITS OF APPOINTMENT AS OMBUDSPERSON**

Mr. Tony Rosenstein's appointment as Ombudsperson in this case is subject to the following terms:

1. Mr. Rosenstein understands that it is necessary for the court to avoid any conflicts of interest and even the appearance of impropriety or bias. Therefore, he has examined the list of parties and counsel in this case and affirms that:
  - A. Neither he, his spouse, nor any resident minor child:
    - I. Is employed by, or receives any form of compensation or benefits from, any of such parties or counsel;
    - II. Has an expectation of, or contract for future employment or any form of compensation from, any such parties or counsel;



III. Has any financial interest in (defined as ownership of a legal or equitable interest in), or a relationship as director, adviser, or other active participant in the affairs of, any of such parties or counsel (ownership in a mutual or common investment fund that holds securities of such parties or entities is not such a financial interest or relationship, unless the individual participates in the management of the fund); and

B. He is not aware of any reason why he would have a bias in favor of or against any of the parties.

2. During his appointment as Ombudsperson, Mr. Rosenstein shall not acquire any financial interest in, nor enter into any relationship as director, adviser, or other active participant in the affairs of, any of the parties or counsel.

I, Tony P. Rosenstein, declare under the penalty of perjury under the laws of the United States of America that I have read this document, that the statements in paragraph 1 are true and correct, and that I agree to comply with the terms of paragraph 2.

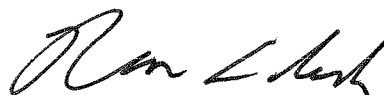
Nov. 13, 2009

Date



Tony P. Rosenstein

So **ORDERED** this 18<sup>th</sup> day of December, 2009.



Ron Clark  
United States District Judge

## **Appendix 2**

**\*\*NOT FOR PRINTED PUBLICATION\*\***

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF TEXAS  
LUFKIN DIVISION

SYLVESTER MCCLAIN, on his own behalf §  
and on behalf of a class of similarly situated §  
persons, ET AL., §

*Plaintiffs,* §

v. §

LUFKIN INDUSTRIES INC., §

*Defendant.* §

CIVIL ACTION No. 9:97CV63

JUDGE RON CLARK

**ORDER Re: MONETARY RELIEF**

The Fifth Circuit has upheld and approved of Judge Cobb’s conclusion that “the size of the class and the inherent uncertainty of the individual claims contraindicates the use of an individualized approach” to the award of back pay and that a formula-driven approach is appropriate. *McClain v. Lufkin Industries, Inc.*, 519 F.3d 264, 281 (5th Cir. 2008). This Court’s obligation on remand is “to compute the total additional wages attributable each year to each promotion and divide the value among the class members . . . with whatever modifications will both expediently and fairly apportion the lost wages among class members.” *Id.*

In carrying out the Fifth Circuit’s mandate, the Court has previously entered several orders on various issues related to the determination of the class monetary relief to be awarded to

Plaintiffs pursuant to the Fifth Circuit's decision on back pay.<sup>1</sup> In addition, the parties have reached agreements, which have been incorporated into stipulations, on certain other issues related to the determination of monetary relief.<sup>2</sup> In this order, the Court (1) incorporates and combines its prior orders and the parties' stipulations, so that all issues previously resolved or determined are set forth in this order, (2) provides for the amount of class back pay and pre-judgment interest to be awarded to Plaintiffs and the Class, and (3) provides for the procedures and methods by which the awards to individual Plaintiffs, Class Representatives, and Class Members shall be determined and paid.

### **I. Total Amount of Back Pay (Damages) Awarded to the Class**

The Court awards a total of \$3,269,845 (the "Back Pay Award"), plus pre-judgment interest (*see* Section II below), in back pay to Plaintiffs for themselves and members of the Class. The Back Pay Award includes the back pay amounts for different groups within the Class (i.e., hourly and salaried) and parts of the liability period determined by stipulations and agreements of the parties and/or prior Orders.<sup>3</sup> The Back Pay Award, along with pre-judgment interest, is to be distributed to individual Class Members as specified in parts III.C-K of this Order.

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<sup>1</sup> [*See* Doc. #647, Order Re: Damages; Doc. #650, Order Re: Damages (2005-2007); Doc. #662, Order (clarifying that pre-judgment interest is to be compounded annually, and directing Plaintiffs to submit a plan for distribution of class back pay award).]

<sup>2</sup> [*See* Doc. #620, Joint Status Report on Back Pay Issues; Doc. #648, Def.'s Stipulation Re: Damages; Doc. #660, Pls.' Status Report on Monetary Relief.]

<sup>3</sup> The determinations of these amounts are reflected in the orders and other filings referred to in footnotes 2 and 3, *supra*.

## II. Pre-Judgment Interest on Award of Back Pay

The Court awards pre-judgment interest on the Back Pay Award, as specified in this paragraph, to and including the date a final judgment is entered based on this order. Interest shall be calculated at the rate of 5% per annum, compounded annually. For the purpose of calculating pre-judgment interest, the amounts of back pay determined for each of the various parts of the liability period will be annualized and attributed to each calendar year within each period, and for hourly and salaried positions separately, as follows:

Year	Hourly Positions	Salaried Positions
March-December 1994	\$217,503.00	\$49,440.60
1995	\$265,837.00	\$60,427.40
1996	\$271,631.00	\$18,293.57
1997	\$271,631.00	\$18,293.57
1998	\$271,631.00	\$18,293.57
1999	\$271,631.00	\$18,293.57
2000	\$271,631.00	\$18,293.57
2001	\$271,631.00	\$18,293.57
2002	\$271,631.00	\$18,293.57
2003	\$243,878.00	0
2004	\$243,878.00	0
2005	\$53,137.00	0
2006	\$53,137.00	0
2007	\$53,137.00	0

Total Back Pay Award (Hourly & Salaried), without interest \$3,269,845.00

Interest shall accrue on the amount of back pay damages attributed to each year from July 1 of such year, except that for 1994, the start date of interest accrual shall be August 1, 1994.<sup>4</sup>

### **III. Class Monetary Award and Allocation Procedures**

#### **A. Third Party Administrator**

1. The Court appoints Rosenthal & Co. of Novato, California to serve as the Third Party Administrator.<sup>5</sup> The Third Party Administrator shall be responsible for: (a) receiving funds from Lufkin and administering those funds to be distributed pursuant to the Court's Order; (b) tracing all Class Member addresses for current addresses; (c) calculating the awards for individual Class Members; (d) preparing and mailing the individual Notices of Judgment Distribution Calculation to Class Members; (e) maintaining a toll-free number designed to provide information to, and communication with, Class Members; (f) responding to questions from Class Members; (g) determining challenges submitted by Class Members to the accuracy of individual Notices of Judgment Distribution Calculation; (h) seeking additional information from Class Members, Class Counsel, or Lufkin when appropriate or necessary to determine eligibility or calculate distribution amounts; (i) implementing the Class Monetary Award and Allocation Procedures; (j)

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<sup>4</sup> The class back pay period commences in March, rather than January, of 1994, and includes the full years 1995-2007. Selecting August 1 as the date on which pre-judgment interest on the amount of damages accruing for 1994 shall commence to accrue is the half-way point between March and December 1994. Similarly, for each of the other years in the class liability period, interest shall commence to accrue on July 1, or the half-way point between January and December of the year.

<sup>5</sup> The Court notes that Rosenthal & Co. was retained by Class Counsel to prepare and mail the Notice to the Class ordered by Judge Cobb in October 2003. [See Doc. #299.] Rosenthal & Co. thus has some familiarity with Lufkin's personnel databases and address information for class members.

determining amounts due for taxes and other withholdings; (k) sending payments to Class members and tracking delivery and receipt of payments; (l) providing the final Class Member Distribution List and accounting for all class funds to the Court and parties; and (m) performing any other duties reasonable and necessary to carry out its responsibilities as set forth in this order.

2. Within seven (7) days of the date a final judgment is entered based on this order, Lufkin will direct the wire transfer of Fifty Thousand Dollars (\$50,000) to the Class Monetary Relief Account. This amount is intended as an advance to cover costs and expenses associated with the Class Monetary Award and Allocation Procedures, as set forth below in Section III.B.

3. All fees, costs, and expenses, if any, of the Third Party Administrator in excess of the Fifty Thousand Dollars (\$50,000) advanced by Lufkin to the Third Party Administrator as provided for in Section III.A.2 above shall be paid from the Class Monetary Relief Account, including the interest earned on the Class Monetary Relief Account. All such payments in excess of Fifty Thousand Dollars (\$50,000) to the Third Party Administrator from the Class Monetary Relief Account shall be approved in advance by Class Counsel with notice to Lufkin.

#### **B. Establishment of the Class Monetary Relief Account**

1. Within three (3) business days of the date a final judgment is entered based on this order, the Third Party Administrator will open an interest-bearing account (the “Class Monetary Relief Account”) with a unique Taxpayer Identification Number.

2. Within three (3) business days of the date a final judgment is entered based on this order, the Third Party Administrator will calculate the total amount of pre-judgment interest that is due on the Back Pay Award pursuant to Section II above (the “Class Pre-Judgment Interest



Award”), and advise the parties and the Court of that amount and the total of the Class Pre-Judgment Interest Award plus the Back Pay Award (“the Class Monetary Relief Fund”).

3. Within ten (10) days of the date a final judgment is entered based on this order, Lufkin will direct the wire transfer of the Class Monetary Relief Fund, as calculated by the Third Party Administrator, to the Class Monetary Relief Account.

### **C. Identification of Class Members and Determination of Time Worked**

1. Within ten (10) days from the date a final judgment is entered based on this order, Lufkin shall provide the Third Party Administrator, in computer readable format, a final list of all Class Members, defined as all African-American employees who were employed by Lufkin Industries, Inc. in its Angelina County, Texas facilities, in any position, at any time during the liability period of March 6, 1994 to December 31, 2007 (the “Class List”). The Class List shall include, for each employee: his/her full name, current or last known address, telephone or other contact numbers, and social security number. All parties shall treat the social security numbers as strictly confidential and to be used by them only to carry out the procedures specified in this order. The Class List shall be used by the Third Party Administrator in sending notices and payments to Class Members as specified herein. By the same date, Lufkin shall also produce to the Third Party Administrator, in computer readable format, personnel and payroll data for all Class Members necessary for the Third Party Administrator to determine the proportionate monetary shares of all Class Members. Such data shall include, at a minimum, for each Class Member: (1) his or her dates of employment by Lufkin in its Angelina County, Texas facilities during the period March 6, 1994 to December 31, 2007; (2) the dates he or she worked in hourly and salaried positions (each category separately); and (3) the number of paid weeks worked in

hourly and salaried positions (each category separately) in any of Lufkin's Angelina County, Texas facilities by year for the period March 6, 1994 to December 31, 2007. Lufkin shall also provide an identical copy of the Class List and such personnel and payroll data to Class Counsel.

2. Within ten (10) days from the date it receives the Class List from Lufkin, the Third Party Administrator shall update the Class List using the National Change of Address or other comparable publicly available databases and information provided by Class Counsel, and shall provide the updated Class List to the parties.

#### **D. Allocation of Back Pay Amounts and Pre-Judgment Interest**

Back pay and pre-judgment interest shall be divided among Plaintiffs, Class Representatives, and Class Members according to the methods and procedures specified in this section. The parties estimate that this division will result in approximately 84% of the Class Monetary Relief Fund being allocated on the basis of time worked by Class Members who satisfy a minimum period of employment requirement (roughly equating time worked with the possibility of lost promotions), with the remaining approximately 16% being allocated in minimum Per-Capita Awards to all Class Members regardless of time worked, and Participation Awards to twenty-two (22) named Plaintiffs, Class Representatives, and actively participating Class Members whose efforts benefitted the Class and contributed to the successful result for the Class in this case.

##### *1. Per Capita Awards to all Class Members*

Each Class Member who worked less than ninety (90) days in hourly and salaried positions during the class period shall be entitled to receive \$375 as a Class Member Per Capita Award, and each Class Member who worked ninety (90) or more days in hourly and salaried

positions during the class period shall be entitled to receive \$750 as a Class Member Per Capita Award.<sup>6</sup> Per Capita Awards will be deducted from the Back Pay Award prior to the pro-rata distribution described in Section III.D.3 below.

*2. Participation Awards to Named Plaintiffs, Class Representatives, and Participating Class Members*

The Court recognizes that the named Plaintiffs, Class Representatives, and other Class Members who spent time assisting Class Counsel in the prosecution of the case, including sitting for depositions, attending mediation sessions, testifying at court hearings and at trial, and devoting other time and providing other assistance, represented the Class and made possible the relief obtained by this litigation and undertook the personal burdens and perceived risks of retaliation. These named Plaintiffs, Class Representatives, and Class Members may and should be awarded individual Participation Awards in addition to their proportionate share recoveries from the Class Monetary Relief Fund. The Court awards a total of \$134,000, approximately 2.4% of that Fund, to twenty-two individuals.

“[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.” *In re Lorazepam v. Clorazepate Antitrust Litig.*, 205 F.R.D. 369, 400 (D.D.C. 2002) (quoting *In re S. Ohio Correctional Facility*, 175 F.R.D. 270, 272 (S.D. Ohio 1997)); *see also In re Dun & Bradstreet Credit Servs. Customer Litig.*, 130 F.R.D. 366, 373 (S.D. Ohio 1990) (“Numerous courts have not hesitated to grant incentive awards to representative plaintiffs who have been able to effect substantial relief for classes they represent.”); *In re Revco Sec. Litig.*, Nos., 851,

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<sup>6</sup> Based on information currently available, these Class Member Per Capita Awards will amount in the aggregate to \$749,250, or approximately 14% of the Class Monetary Relief Fund.

89CV593, 1992 WL 118800, at \*7 (N.D. Ohio May 6, 1992) (“Numerous courts, recognizing that serving as a class representative involves a substantial time commitment to the litigation, have permitted such awards.”); *Van Vranken v. Atl. Richfield*, 901 F. Supp. 294, 300 (N.D. Cal. 1995). Other courts have noted that, particularly in discrimination litigation, named plaintiffs should be compensated for running the risk of retaliation in the workplace:

In discrimination-based litigation, the plaintiff is frequently a present or past employee whose present position or employment credentials or recommendation may be at risk by reason of having prosecuted the suit, who therefore lends his or her name and efforts to the prosecution of litigation at some personal peril.

*Roberts v. Texaco*, 979 F. Supp. 185, 201 (S.D.N.Y. 1997). Courts also have approved incentive awards to active class members who are not named plaintiffs, but who provided assistance in the prosecution of the class action. *E.g.*, *Huguley v. Gen. Motors Corp.*, 128 F.R.D. 81, 85 (E.D. Mich. 1989); *Bryan v. Pittsburgh Plate Glass Co.*, 59 F.R.D. 616, 617 (W.D. Pa. 1973).

The total amount of the Participation Awards and the individual amounts awarded here are reasonable and consistent with awards in other cases in the Fifth Circuit. *See In re Catfish Antitrust Litig.*, 939 F. Supp. 493, 504 (N.D. Miss. 1996) (approving incentive awards of \$10,000 to each of the four named plaintiffs); *Shaw v. Toshiba Am. Info. Sys., Inc.*, 91 F. Supp. 2d 942, 973 (E.D. Tex. 2000) (approving incentive awards of \$25,000 to each of two named plaintiffs). The Court notes that particularly in this case, where the named Plaintiffs, Class Representatives, and Class Members to be awarded Participation Awards have had to expend time and effort on the case in order to represent the class, keeping it engaged and encouraging it to remain patient for over a decade, and to incur actual or perceived risk of retaliation by their employer, such Participation Awards are especially appropriate. The Court further notes that the Participation

Awards, individually and in the aggregate, are modest in proportion to the Class Back Pay Relief Fund, and under the formula-driven approach used in this case, it is unlikely that these awards could fairly be said to diminish significantly any absent Class Member's particular award in relation to his or her actual loss.

The Court awards such Participation Awards to the named Plaintiffs, Class Representatives, and Class Members named in Exhibit A to this order, in the amount specified for each in Exhibit A.<sup>7</sup> These amounts were determined based on a point system, in which points were assigned to several objectively verifiable tasks and roles, including: service as a named Plaintiff, filing of an EEOC charge on which class claims were based, attendance at mediation sessions, service as a Class Representative, testifying at trial, incurring the perceived risk of possible retaliation as a result of continuing to work at Lufkin after being designated as a Plaintiff or Class Representative, giving deposition testimony, testifying at class certification hearings, and testifying by declaration. *See Dun & Bradstreet*, 130 F.R.D. at 374 (“[A] differentiation among class representatives based upon the role each played may be proper in given circumstances.”). Participation Awards will be deducted from the Back Pay Award prior to the pro-rata distribution as described in Section III.D.3 below.

### *3. Back Pay Awards Based on Time Worked*

The balance of the Class Monetary Relief Fund, consisting of the remaining Back Pay Award and all of the pre-judgment interest, will be distributed pro rata, with the Back Pay Award

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<sup>7</sup> Based on the information currently available, the amount of the Participation Awards, in the aggregate, is \$134,000, or approximately 2.4% of the Class Monetary Relief Fund. The largest single individual Participation Award, for named Plaintiff McClain, is \$18,000, or approximately 0.3% of the Class Monetary Relief Fund.

distribution on the basis of the time worked during the entire liability period, and the interest distribution based on the time worked during each calendar year. The time worked calculations and the amounts due based on such time worked shall be done for hourly and salaried categories of workers, and for the time periods 1994-1995, 1996-2002, 2003-2004, and 2005-2007 separately, based on the annual back pay numbers by category as set forth in section II above.

*a. Distribution of Back Pay Principal Based on Time Worked*

The balance of the Class Monetary Relief Fund (“Eligible Class Member Award”), approximately \$4,594,000 (or approximately 83.9% of the Class Monetary Relief Fund), shall be allocated among and paid to individual Class Members who worked a minimum of at least one consecutive ninety (90) day period for Lufkin in its Angelina County, Texas facilities during the liability period (“Eligible Class Members”). The Eligible Class Member Award will be distributed pro rata based on the number of “Eligible Class Weeks” worked by each Eligible Class Member in each job category (hourly or salaried) and each time period (1994-1995, 1996-2002, 2003-2004, and 2005-2007). Any class member who worked in both job categories and/or in more than one time period shall receive his or her pro rata distribution from each of the categories and/or periods in which he/she worked. “Eligible Class Weeks” is defined as all paid weeks worked by Eligible Class Members for Lufkin in its Angelina County, Texas facilities during the back pay liability period. The Third Party Administrator shall be responsible for identifying all Eligible Class Members and calculating their pro rata shares of the Back Pay Award based on the employment records and data produced by Lufkin pursuant to Section III.C.1 above.

*b. Distribution of the Class Pre-Judgment Interest Award*

The Class Pre-Judgment Interest Award, calculated pursuant to Section II above, shall be distributed among Eligible Class Members as specified in this section. For each year in the liability period, the interest for that year shall be distributed to Eligible Class Members pro rata based on the number of Eligible Class Weeks worked in that job category and during that year by each Eligible Class Member. The Third Party Administrator shall be responsible for identifying all Eligible Class Members and calculating their pro rata shares based on the employment records and data produced by Lufkin pursuant to Section III.C.1 above.

**E. Notice of Estimated Awards to Class Members**

1. The Third Party Administrator shall provide a list of all Class Members' estimated awards to the Court, Lufkin, and Class Counsel within twenty-one (21) days after Lufkin provides it with the records specified in Section III.C.1 above.

2. At the same time, the Third Party Administrator will prepare and mail a "Notice of Judgment Distribution Calculation" for each Class Member. The Notice shall contain a brief description of the lawsuit (to be agreed upon by the parties), the Court's final judgment regarding back pay and interest, a concise description of the distribution formula, and the data used to calculate the Class Member's estimated individual award. The Notice also shall advise Class Members that they do not have a right to challenge the distribution formula, but they do have a right to challenge the accuracy of the data (dates of employment, time worked, and job category) used to calculate the Class Member's individual award. The Notice also shall advise Class Members that the Class Member's estimated individual award may change depending on the resolution of Class Member Challenges.

3. The Third Party Administer will trace all mailed Notices of Judgment Distribution Calculation that are returned as undeliverable and re-mail notices where updated addresses may be obtained with reasonable effort and expense.

#### **F. Class Member Challenges**

1. Class Members receiving “Notice of Judgment Distribution Calculation” shall not be required to respond or take any action with respect to the Notices in order to receive their estimated individual awards, or any adjustment to the awards that may be necessary due to the Third Party Administrator’s resolution of Challenges or otherwise, as provided for herein.

2. Class Members wishing to challenge the accuracy of the data used to calculate their estimated individual awards must submit such challenge and request for correction of errors in information used to calculate their estimated share of the Class Monetary Relief Fund (“Challenge”) in writing to the Third Party Administrator in a timely manner as specified herein. Class Members shall not have the right to raise any other claims or contentions in Challenges.

3. The Third Party Administrator will mail Notices of Judgment Distribution Calculation upon request. If an individual requesting such Notice is not on the Class List, the portion of the Notice which would otherwise state the individual data used to calculate estimate award will state that Lufkin’s records indicate that the person is not African-American and/or was not employed by Lufkin in its Angelina County facilities during the liability period. Such individuals may challenge the accuracy of that information through the procedures set forth in this Section and as described on the Notice of Judgment Distribution Calculation.



4. Class Members must send their written Challenges to their estimated individual awards as well as any applicable documentation, to the Third Party Administrator, postmarked by no later than forty-five (45) days after the date of the Notice (“Challenge Filing Deadline”).

5. The Third Party Administrator shall retain all of the job history information or other electronic data pertaining to Class Members that it receives from Lufkin from which the Third Party Administrator determined the Class Members’ estimated individual awards, as specified above. Lufkin shall respond to a request by the Third Party Administrator for additional information the Third Party Administrator determines to be necessary to respond to a Class Member’s Challenge, within fourteen (14) days of such request.

6. The Third Party Administrator shall attempt to expeditiously resolve each such Challenge within thirty (30) days after its receipt of such Challenge. Challenges to the computation of Class Members’ estimated individual awards will be resolved without hearing by the Third Party Administrator. The Third Party Administrator’s decision shall be communicated to the Class Member in writing and shall be final, binding and non-appealable.

7. The Third Party Administrator shall be available through the toll-free line to respond to Challenges and questions from Class Members.

#### **G. Distribution of the Monetary Awards**

1. As soon as practicable after making the calculations required by Section III.D. above, and resolution of all Challenges pursuant to Section III.F above, but in any event no more than one hundred twenty (120) days from the date of the initial mailing of Notices of Judgment Distribution Calculation, the Third Party Administrator shall recalculate the Class Members’ individual distributions and provide a Final Distribution List to the parties and file a copy with

the Court. The parties may submit any comments on the Final Distribution List in writing within ten (10) days after the date the Third Party Administrator files the Final Distribution List with the Court.

2. Within fourteen (14) days of the Court's entry of an order directing distributions based on the Final Distribution List and any comments filed by the parties, the Third Party Administrator shall distribute the monetary awards to Class Members via UPS Ground delivery service (with delivery tracking).

3. The Third Party Administrator shall only issue checks in the names of Class Members, unless Section III.J below is applicable.

4. The Third Party Administrator will include with the check(s) due to the Class Member a statement showing the gross amount of the payment(s) for both back pay and interest awards and an itemized statement of all deductions made. Appropriate deductions from gross amounts that are determined to be wage payments will be made for federal income taxes, the employee's share of social security and Medicare taxes, and any state or local income or payroll taxes that may apply. Any amounts designated as interest shall not be subject to withholdings and shall be reported, if required, to the IRS on Form 1099-INT. Any amounts designated as lost wages or payments in lieu of wages shall be subject to payroll tax withholding deductions and shall be reported to the IRS on Form W-2. The statement will advise Class Members that, regardless of withholding, all or part of the amount received may be taxable, that the Court, Lufkin, Plaintiffs' counsel and the Third Party Administrator are not providing tax advice, and that it is the responsibility of the Class Member to determine and pay any applicable taxes.

5. All checks issued by the Administrator pursuant to this order shall be payable within ninety (90) days of the date the check was issued, and shall be made non-payable and void thereafter.

#### **H. Tax Withholdings and Reporting**

The Third Party Administrator will inform Lufkin of the employer's share of all taxes or contributions (i.e., matching social security, Medicare, or other required withholding or payroll taxes) required to be paid by Lufkin, and Lufkin shall timely remit all such payments to the Third Party Administrator for payment to appropriate taxing authorities. The Third Party Administrator will be responsible for preparing and filing all appropriate tax filings and reports (except for any unemployment compensation taxes that may be due, which will be the sole responsibility of Lufkin to calculate and pay), including, but not limited to, W-2 and 1099 forms for all Plaintiffs, Class Representatives, and Class Members for their payments from the Class Monetary Relief Fund, as well as any required for the Class Monetary Relief Account. The Third Party Administrator will be responsible for reporting and remitting to the appropriate taxing authorities both the employee taxes withheld on amounts paid from the Class Monetary Relief Fund, and the employer's share of taxes or contributions required to be paid by Lufkin in a timely manner after receipt of the amount due for those payments from Lufkin.

#### **I. Tracking and Procedures for Undeliverable Checks**

1. The Administrator shall track the delivery of all checks mailed to Class Members and make all reasonable and customary efforts, including follow-up mailings and further searches, and/or reissuance of checks, to ensure their actual delivery.

2. Any checks that remain undeliverable after the Administrator's efforts to accomplish delivery shall be voided. Returned checks for which no updated address is available shall be included in the funds re-distributed pursuant to Section III.K below.

3. Sixty (60) days after the initial mailing of checks, the Administrator will provide an accounting to Class Counsel of all checks returned undeliverable for which no updated address is available, and of all uncashed checks.

#### **J. Deceased Settlement Class Members**

Any allocation payable to a deceased Class Member shall be made payable to the estate or legal successor of the deceased Class Member upon timely receipt by the Third Party Administrator of proper written proof of the estate's or legal successor's entitlement to receive the deceased Class Member's assets.

#### **K. Distribution of Remaining Funds**

In the event that Class Members entitled to participate in the Class Monetary Relief Fund cannot be located by the Third Party Administrator, mailed checks are returned as undeliverable, delivered checks are not cashed within ninety (90) days of their mailing, and/or that the Class Monetary Relief Fund is not completely distributed for any other reason, the remaining undistributed sum shall be re-distributed in the following order: (1) to make any additional payments to Class Members occasioned by mistakes in the calculations of their tenure for Lufkin in its Angelina County, Texas facilities during the liability period, or other errors or omissions of Lufkin or the Third Party Administrator; (2) if the amount remaining after such additional payments have been made is \$100,000 or more, to make a supplemental pro-rata distribution to Eligible Class Members, in proportion to the amounts allocated to them on the Final Distribution

List. Any amounts remaining in the Class Monetary Relief Fund after the completion of the foregoing payments and distributions shall be designated as a *Cy Pres* Fund to be distributed to one or more *cy pres* recipients who shall be designated by Plaintiffs subject to the Court's approval of the designation(s). Such designation(s) shall be submitted to the Court within two hundred forty (240) days after the entry of the judgment based on this order.

#### **L. Report from Third Party Administrator**

Within thirty (30) days of the final distribution of the monies from the Class Monetary Relief Fund, the Third Party Administrator shall furnish an accounting of all distributions from the Class Monetary Relief Fund to the Court, with copies to Class Counsel and Lufkin.

#### **IV. Implementation of This Order**

The parties shall expeditiously and cooperatively, insofar as possible, carry out this order, including the making and implementation of any further agreements, processes, and mechanisms necessary to carry out its terms and intent, other than those specified in this order. In the event the parties encounter any disputes necessary to resolve in order to implement the provisions of this order efficiently, fairly, and expeditiously, they shall bring such disputes to the Court's attention for prompt resolution.

#### **V. Attorneys' Fees and Costs**

Any award of attorneys' fees and costs to Plaintiffs for their counsel's advances or work on the monetary and injunctive relief issues in this case since December 31, 2008, is expressly reserved for further proceedings and orders of the Court. Payments made to the Class or individual Class Members as specified in this order are without prejudice to the right of Plaintiffs

to seek further payments by Lufkin for costs and attorneys' fees incurred in obtaining this order at a time and in a manner to be prescribed by the Court.

### **VI. Entry of Final Judgment**

The Court intends to enter Final Judgment in this case on January 15, 2010. Based on this anticipated judgment date, the parties are hereby **ORDERED** to submit, by January 12, 2010], a joint report that includes (1) a list of Class Members and amounts to be awarded, and (2) proposals for the specific language or form appropriate for the judgment.

So **ORDERED** and **SIGNED** this 22 day of **December, 2009**.



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Ron Clark, United States District Judge

Exhibit A

<b>Name</b>	<b>Participation Award</b>
Walter Butler	\$7,000.00
Vivian Crain	\$4,000.00
Calvin Deason	\$3,000.00
Clifford Duirden	\$8,000.00
Leroy Garner	\$6,000.00
Roald Mark	\$6,000.00
Eddie Mask	\$8,000.00
Sylvester McClain	\$18,000.00
Rickey Menefee	\$1,000.00
Clarence Owens	\$8,000.00
Kelvin Pope	\$5,000.00
Earl Potts	\$8,000.00
Patrick Ross	\$6,000.00
Kenneth Singleton	\$2,000.00
Sherry Swint	\$5,000.00
Buford Thomas	\$14,000.00
Curtis Thomas	\$1,000.00
Shirley Thomas	\$1,000.00
Florine Thompson	\$12,000.00
Benny Townsend	\$1,000.00
James White	\$2,000.00
Mary Williams	\$8,000.00
<b>Total</b>	<b>\$134,000.00</b>

## **Appendix 3**



**\*\*NOT FOR PRINTED PUBLICATION\*\***

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF TEXAS  
LUFKIN DIVISION

SYLVESTER MCCLAIN, on his own and on §  
behalf of a class of similarly situated persons, §  
et al., §

*Plaintiffs,* §

v. §

LUFKIN INDUSTRIES, INC. §

*Defendant.* §

Civil Action No. 9:97-CV-063

JUDGE RON CLARK

**ORDER Re: ATTORNEYS' FEES**

Plaintiffs move for an interim award of attorneys' fees, costs and expenses. [Doc. #599]. The motion includes a request of attorneys' fees, and the costs and expenses previously awarded by Judge Cobb. Plaintiffs also submitted a Supplemental Bill of Taxable Costs [Doc. #600], requesting costs accrued after Judge Cobb's award. By applying the lodestar methodology, the court awards attorneys' fees totaling \$4,740,195.80. The court also awards \$140,562.26 in costs and \$932,603.84 in litigation related expenses.

**I. BACKGROUND**

- February 26, 1997                      Plaintiffs filed an employment discrimination suit alleging that Defendant Lufkin Industries, Inc. engaged in racial discrimination in violation of Title VII and 42 U.S.C. § 1981.
- March 31, 1999                        The court granted Plaintiffs' motion for class certification.
- January 13, 2005                      After a bench trial, Judge Cobb entered a Memorandum and Order finding that Defendant Lufkin Industries discriminated by unlawfully making initial assignment and promotion decisions that

disparately impacted Plaintiffs. [Doc. #461]. The court ordered Lufkin Industries to pay class back pay pursuant to a formula and awarded injunctive relief. Judge Cobb entered final judgment a day later. [Doc. #462].

- January 19, 2005 On Plaintiffs' motion, Judge Cobb ordered further proceedings "to determine the specific details of non-monetary remedial measures and to enter such supplemental remedial orders as may be necessary and appropriate." [Doc. #464].
- March 10, 2005 Plaintiffs filed an initial motion for an award of attorneys' fees and costs. [Doc. Nos. 499-502].
- August 29, 2005 The court entered an Amended Final Judgment, reiterating a finding of discrimination, ordered Lufkin Industries to pay back pay, entered an injunction, and awarded attorneys' fees and costs. [Doc. #552].
- February 29, 2008 The Fifth Circuit vacated the injunctive order and remanded to this court to craft a more specific remedial order. The Fifth Circuit also reversed and remanded the portion of Judge Cobb's order awarding damages and attorneys' fees indicating that additional analysis was necessary. *McClain v. Lufkin Industries, Inc.*, 519 F.3d 264 (5th Cir. 2008).

## II. APPLICABLE LAW

Title VII provides that a court may, in its discretion, award the "prevailing party" in any action under that subchapter "a reasonable attorney's fee." 42 U.S.C. § 2000e-5(k). A plaintiff may be considered a "prevailing party" if he succeeds on any significant issue in litigation that achieves some of the benefit the party sought in filing suit. *Hensley v. Eckerhart*, 461 U.S. 424, 433, 103 S. Ct. 1933, 1939 (1983). Fee applicants bear the burden to show the reasonableness of the hours billed and must provide evidence in addition to their own affidavits. *Blum v.*

*Stenson*, 465 U.S. 886, 896, 104 S.Ct. 1541, 1547 (1984); *Walker v. U.S. Dept. of Housing & Urban Dev.*, 99 F.3d 761, 770 (5th Cir. 1996).

The determination of what is a “reasonable attorney’s fee” is left to the discretion of the trial court. *Hensley*, 461 U.S. at 433. To decide the appropriate attorney’s fee, the trial court must calculate a “lodestar” fee by multiplying the number of hours reasonably expended on the case by a reasonable hourly rate. *Rutherford v. Harris County*, 197 F.3d 173, 192 (5th Cir. 1999).

The court should exclude time that is “excessive, duplicative, or inadequately documented” from the number of hours reasonably expended. *Watkins v. Fordice*, 7 F.3d 453, 457 (5th Cir. 1993) (citing *Hensley*, 461 U.S. at 432-34, 103 S.Ct. at 1939; *Von Clark v. Butler*, 916 F.2d 255, 259 (5th Cir.1990)).

A reasonable hourly rate is set by the prevailing market rate charged by local attorneys. *Blum*, 465 U.S. at 895, 104 S.Ct. at 1547. A rate is reasonable if it is “in line with those prevailing in the community for similar services by lawyers of reasonably comparable skill, experience, and reputation.” *Blum*, 465 U.S. at 896, 104 S.Ct. at 1547. Thus, a more experienced attorney with expertise in a particular area of law may command a higher rate. The applicant must provide evidence of the education and experience of each attorney and paralegal for whom fees are requested.

Generally, the reasonable hourly rate is established through affidavits of other attorneys practicing in the district. *Tollett v. City of Kemah*, 285 F.3d 357, 368-69 (5th Cir. 2002). If the court deviates from an attorney’s normal billing rate which falls within the range of market rates

for similarly capable attorneys, the court must articulate its reasoning. *Watkins v. Fordice*, 7 F.3d 453, 459 (5th Cir. 1993).

To adjust for inflation, deferred payment, and unpaid interest, the court may award attorneys' fees at the current hourly rate instead of historic hourly rates charged during the litigation process. *Missouri v. Jenkin by Agyei*, 491 U.S. 274, 284, 109 S.Ct. 2463, (1989) (holding that plaintiffs are entitled to "an appropriate adjustment for delay in payment-whether by the application of current rather than historic hourly rates or otherwise.").

Where the claimed rate and number of hours are established as reasonable, the resulting product is presumed to be reasonable. *Blum*, 465 U.S. at 897, 104 S. Ct. at 1548. A presumption exists that the calculated lodestar is the reasonable fee and should only be modified in an exceptional case. *Watkins v. Fordice*, 7 F.3d 453, 457 (5th Cir. 1993).

In determining whether to modify a lodestar, the court considers the twelve *Johnson* factors. *Rutherford v. Harris County, Tex.*, 197 F.3d 173, 192 (5th Cir.1999). The *Johnson* factors are: (1) time and labor required; (2) novelty and complication of the issues; (3) skill required; (4) whether the attorney had to refuse other work to litigate the case; (5) attorney's customary fee; (6) whether fee is fixed or contingent; (7) whether the client or case circumstances imposed any time constraints; (8) the amount involved and the results obtained; (9) attorney's experience, reputation, and ability; (10) whether the case was "undesirable;" (11) nature and length of relationship with the clients; and (12) awards in similar cases. *Id.* at n.23; *Johnson v. Ga. Highway Express, Inc.*, 488 F.2d 714, 717-19 (5th Cir. 1974). "[T]he most critical factor in determining the reasonableness of a fee award in a civil rights suit is the degree of success

obtained.” *Giles v. Gen. Elec. Co.*, 245 F.3d 474, 491 n.31 (5th Cir. 2001) (quoting *Farrar v. Hobby*, 506 U.S. 103, 114, 113 S. Ct. 566 (1992)).

### III. ANALYSIS

#### **A. Prevailing Party**

It is uncontested that Plaintiffs are the prevailing party. Judge Cobb previously found for Plaintiffs and the Fifth Circuit affirmed most of the District Court’s findings, including the finding of unlawful disparate impact resulting from Lufkin’s subjective decision making. Plaintiffs will obtain class back pay and an injunction. Plaintiffs sought this relief and are the prevailing party.

#### **B. Number of Hours**

Plaintiffs assert that the hours billed are reasonable because new legal theories of “classwide discrimination arising from subjective decision making” were involved for which “no blueprint” was available. Doc. #599 at 12. Plaintiffs further contend that business judgment was exercised by deleting over 3,000 hours from time actually billed. *Id.* at 13. They provide detailed billing records for the attorneys and staff who worked at the law firm Goldstein, Demchak, Baller, Borgen & Dardarian (“the Demchak Firm”) (Doc. #599, Ex. 24 to the Declaration of Teresa Demchak) and those who worked at the law firm of Stucky, Garrigan & Castetter (“the Garrigan Firm”) (Doc. #599, Ex. 1 to Declaration of Timothy B. Garrigan).

Defendant objects to certain time billed on the basis that certain entries are duplicative or excessive time billed, the Demchak Firm overstaffed, the partners participated in work that lower paying attorneys could handle, the Garrigan Firm’s records are alleged inadequate, and individuals billed non-working travel time at their full hourly rate. *Id.* at 15-19.

### 1. Allegedly Excessive, Duplicative, or Overstaffed Time

Excessive or duplicative time should be excluded. *Watkins v. Fordice*, 7 F.3d 453, 457 (5th Cir. 1993). The court also excludes hours that are overstuffed, being mindful that “the skill and experience of lawyers vary widely.” *Hensley v. Eckerhart*, 461 U.S. 424, 434, 103 S.Ct. 1933, 1939-40 (1983).

#### *a. June 28, 2000 to November 30, 2000*

Defendants assert that the Demchak Firm charged excessive fees before being appointed counsel for Plaintiffs as they charged approximately 422 hours to review papers, research and confer to decide if they wanted to be involved in the case during the time period between June 28, 2000 and November 30, 2000.<sup>1</sup> Reviewing the detailed records kept by the Demchak Firm, the court does not find excessive or duplicative time entries. Attorneys for the Demchak Firm reviewed the case documents during this time period. A review of the case is necessary to understand the legal and factual issues involved in the litigation. The attorneys also performed more substantive work on issues, such as (1) who would be an appropriate mediator; (2) potential bifurcation of the trial; and (3) providing notice to possible class members, including preparing for meetings with union representatives. All of these hours should be included in the lodestar calculation.

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<sup>1</sup>Defendants assert that approximately 422 hours were billed between June 28, 2000 and October 2, 2000 by the Demchak Firm, citing the Declaration of Carolyn Wood. The declaration indicates that 422.4 hours were performed by the Demchak Firm between June 28, 2000 and November 30, 2008. The court assumes this is the appropriate time frame Defendant intended to indicate in its response.

*b. December 2000 to May 2003*

Defendant objects to the amount billed between December 2000 and May 2003 when the parties were mediating the case. Defendant insinuates that the amount charged is excessive because on a per day of mediation, the amount charged is large. However, Defendant billed for a number of activities over the two and a half year period and there were 22 days of mediation over that time frame. Dividing the total amount billed of the entire period by the number of mediations does not provide an accurate reflection of all of the work that occurred. Rather it is simply an attempt to skew the numbers to appear more favorable to Defendant's position.

Defendant further objects to the number of attorneys present at the mediations, with as many as four attorneys present at some of them. Defendant does not object to any specific entries or discuss why all attorneys were not needed at the mediations. For example, Defendant does not assert that it had only one attorney present. The court does not find any excessive or duplicative entries that must be removed.

*c. The number of hours billed during depositions*

\_\_\_\_\_ Defendant criticizes the number of hours Plaintiffs' counsel spent taking depositions. Defendant objects to the number of attorneys present during five depositions in which at least two and once three attorneys were present. Usually, this court would find it excessive for more than two attorneys to attend a deposition in a complex case — one deposing the witness and another aiding the deposing attorney. Defendant has not asserted that a second attorney was not necessary, or at least helpful, at any deposition. Given the issues in this particular case, the fact that Ms. Demchak, a lead partner, was also present at one, or even a few, depositions is not

excessive. The court finds that the time billed for depositions is reasonable and will not be excluded.

*d. The number of lawyers present at trial*

Defendants indicate that Plaintiffs had five lawyers at counsel table during the first phase of trial then three lawyers present during the second phase of trial. Defendants do not provide the number of attorneys present at their table and do not indicate that they only had one attorney present. The court does not find the number of Plaintiffs' attorneys present at trial to be an excessive number given the complexity of the case. Multiple attorneys are often needed in complex cases. The court does not find this to be duplicative or excessive.

*e. The number of hours spent reviewing documents*

Defendants object to the 782.4 hours that the Demchak Firm spent analyzing and reviewing bid sheets. It is uncontested that Plaintiffs' own expert considered the bid sheets unreadable and not worthy of analysis. It may be reasonable for senior attorneys to review the bid sheets and the expert's opinions, but once an expert determined that the bid sheets were not worthy of analysis, additional time spent by paralegals and younger attorneys was unnecessary. The Demchak Firm makes no showing that the time billed was prior to the expert's determination. The following time for review of bid sheets will be excluded.

<b>Reviewer</b>	<b>Number of Hours Spent</b>
Konecky	7.60
Dungan	363.90
Rafanan	134.40
Gurtner	216.50



Stern	167.50
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## 2. Litigation Activities of Partners

Defendant objects to certain activities to which partners Ms. Demchak and Mr. Baller billed their time. Specifically, Defendants assert that Ms. Demchak should not have billed such excessive hours to draft Findings of Fact and Conclusions of Law; prepare for and attend depositions; discovery; or spend so much time drafting Plaintiffs' First Motion for Attorneys Fees; and that Mr. Baller should not have billed such excessive hours to draft Findings of Fact and Conclusions of Law.

The court recognizes that good attorneys litigate in their own manner and does not require an attorney to practice in a certain way. While Ms. Demchak engaged in tasks often associated with attorneys more junior than herself, it is possible that she completed these tasks more quickly, with less need for subsequent review and revision by another attorney. *League of United Latin American Citizens No. 4552 (LULAC) v. Roscoe Independent School Dist.*, 119 F.3d 1228, 1233, n.3 (5th Cir. 1997). It is also understandable that she wished to take part in the drafting of the Motion for Attorney Fees due to the large amount owed to Plaintiffs' counsel. The court does not find that any of these activities in which Ms. Demchak and Mr. Baller participated were unnecessary and should be excluded.

## 3. The Garrigan Firm's Records

Defendant contends that the Garrigan Firm's Records are inadequate because they lack detail. Doc. #610 at 18. Defendant does not cite specific examples, rather asserting that the Garrigan Firm's records "consist almost entirely" of non-detailed entries. While inadequate documentation may reduce the award of attorneys' fees, the court finds the Garrigan Firm's

records sufficiently detained to determine (1) the activity; (2) the participants; and (3) the work product. *See Watkins v. Fordice*, 7 F.3d 453, 457 (5th Cir. 1993). While not verbose, the Garrigan Firm's records provide sufficient detail to understand the nature of the work. A representative entry, the time entry on September 4, 2003, states:

travel: Nac-Beaumont-Nac	5 hr	
mediation	7 hr	30 min
post-mediation mtg w/ Atty Demchak & clients		30 min

Doc. #599, Ex. 1 to Declaration of Timothy Garrigan at p. 92.

The court is easily able to determine that Mr. Garrigan traveled from Nacogdoches, TX to Beaumont, TX then drove back to Nacogdoches. He also attended a mediation between the parties and then had a meeting with his clients and Ms. Demchak.

Moreover, because Mr. Garrigan interacted with his co-counsel from the Demchak Firm, many cross-references exist in each firm's billing records. These provide the additional clarification desired and the court sees no reason to reduce the hours billed by the Garrigan Firm.

#### 4. Travel Billed at the Full Rate

Defendant contends that Plaintiffs' counsel are not entitled to the full billing rate for travel time. The Demchak Firm billed 545 hours of travel time, in addition to the 153 hours of working travel time, while the Garrigan Firm billed 301 hours of travel time. An attorney's stock in trade consists of knowledge, the ability to communicate and time. The court finds it reasonable to travel to a deposition, mediation, or trial and bill the time at an attorneys' full rate. Working while traveling is often difficult and is unsafe if the attorney is driving a car. It might be unreasonable for an attorney to bill large amounts of travel time for a short event of relatively minor importance that could be handled telephonically or by local counsel, but there is no

indication that this occurred. When attorneys from the Demchak Firm traveled to the Eastern District they performed multiple functions, such as a deposition coupled with a number of days of mediation. The court does not find that either the Garrigan Firm or the Demchak Firm has excessively billed travel time. The court will not make reductions for any travel time.

#### 5. Summary of Excluded Hours

The total number of hours the court will exclude for all unreasonable entries, objected to by Defendant or found by the court, is as follows:

<b>Attorney</b>	<b>Total Hours Excluded</b>
Konecky	7.6
Dungan	363.9
Rafanan	134.4
Gurtner	216.5
Stern	167.5

### **C. Appropriate Rate**

#### 1. Mr. Garrigan of the Garrigan Firm

Mr. Garrigan bills his time at \$400/hr. To support his billing rate he offers affidavits of partners who engage in complex litigation in the Eastern District of Texas, namely Clayton Dark, Claude Welch, and Otis Carroll.<sup>2</sup> These attorneys practice regularly in this court, and the court is familiar with their qualifications and the quality of their work. They state that Mr. Garrigan's rate of \$400/hr is reasonable.

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<sup>2</sup>Stephen D. Susman also provided his billing rate, but he practices nationally and is located in Houston, which is located in the Southern District of Texas, not the Eastern District. The court does not find his affidavit probative of the rates charged in the Eastern District of Texas.

Mr. Garrigan's comparison to those who participate in complex litigation is appropriate. This class action was complex. *See Amchem Prods. v. Windsor*, 521 U.S. 591, 614, 117 S. Ct. 2231, 2245 (1997); *Gates v. Cook*, 234 F.3d 221, 227 (5th Cir. 2000) ("It is a well-established principle that district courts enjoy wide latitude in managing complex litigation in general and class actions in particular."); Fed. R. Civ. P. 23 (g)(1)(A)(ii); *see also Manual for Complex Litigation* § 21 (4th ed. 2004).

Depending on the circumstances, a "normal" employment law case may also qualify as complex litigation. *Manual for Complex Litigation* § 32.1 (4th ed. 2004) ("complexity can be introduced into employment discrimination suits by class action allegations, questions regarding the scope of discovery, the technical nature of expert testimony, and issues relating to the granting of relief, whether by way of judgment or consent decree."). When the class was certified, Judge Cobb approved Mr. Garrigan as class counsel because he was experienced both in employment law and complex litigation. *McClain v. Lufkin Indus., Inc.*, 187 F.R.D. 267, 282 (E.D. Tex. 1999). The class action and the nature of the case which involved discrimination in the hiring and promotion procedures at Lufkin Industries and the asserted legal theories makes this case a complex case.

Attorneys experienced in employment law from the Eastern District of Texas agree that the case needed to be handled by attorneys experienced in complex litigation and find the rates charged by Mr. Garrigan are reasonable. *See e.g.* Declaration of Joe C. Tooley at ¶1 (stating that Mr. Garrigan's request of \$400/hr is within the range of fees charged by those in the Eastern

District of Texas who handle complex litigation matters);<sup>3</sup> Declaration of Franklin Jones, Jr. at 2 (stating that Mr. Garrigan's rate of \$400/hr is within the range of fees paid to attorneys in the Eastern District of Texas).<sup>4</sup> The court will therefore apply a \$400/hr rate for the work performed by Mr. Garrigan.

## 2. Partners at the Goldstein Demchak Law Firm

Plaintiffs contend that the court should disregard the local rates for the Goldstein Demchak Law Firm ("Demchak Firm") and apply a rate commensurate with attorneys from the northern California area where the Demchak Firm is located because of its unique experience dealing with employment discrimination class action cases.

When the Demchak Firm entered the case in 2000, Mr. Garrigan had already certified the case and Lufkin's appeal had been rejected. While it was still necessary to mediate the case, complete discovery, and try the case, Mr. Garrigan participated to a greater extent than any other attorney. He certified the class, was lead counsel throughout the entirety of the case, and examined 11 out of 22 witnesses at trial. The Demchak Firm possessed experience settling class action employment cases, but there is no evidence to suggest that they were experienced at trying such cases.

Plaintiffs have firmly established that in calculating the fee for Mr. Garrigan the appropriate community for rate comparison purposes are those who participate in complex litigation in the Eastern District of Texas. It would be difficult to justify assigning a higher

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<sup>3</sup> The court will take notice that Mr. Tooley practices in the field of civil rights in the district.

<sup>4</sup> The court is familiar with Mr. Jones' experience in the district.

hourly rate to second-chair attorneys, no matter how skilled in employment law. No unusual circumstances exist to suggest that those in the Eastern District who have experience with complex litigation were unavailable and could not have effectively participated. The court is aware of many attorneys in the Eastern District experienced in employment law and complex litigation. Two who would not be likely to have a conflict with Lufkin Industries are Clyde Siebman and John Werner. Absent sufficient evidence that experienced, qualified local counsel were unwilling to participate, the court will not assume counsel from distant states were necessary. Counsel at the Demchak Firm are located in Oakland, California, but it was their choice to participate on this case. Mr. Garrigan brought the suit, certified the class and carried the yeoman's burden at depositions and trial. Based on the affidavits, Mr. Garrigan was the attorney with extensive experience as first chair in actual trials. The Demchak Firm's attorneys undoubtedly provided valuable support but they cannot expect to receive rates fifty percent higher than Mr. Garrigan's, especially when the court has approved the time they spent in traveling from California.

Hourly rates should be computed according to the prevailing market rates in the relevant legal market. *Van Ooteghem v. Gray*, 774 F.2d 1332, 1338 (5th Cir. 1985). This court will apply local rates for the Demchak Firm. *Hopwood v. State of Texas*, 236 F.3d 256, (5th Cir. 2000) (affirming the district court's reduction in the hourly rate of Theodore Olson, an appellate litigator of note whose rate had been upheld as reasonable by the D.C. Circuit in an unrelated case, because the relevant market was Austin, TX, not the District of Columbia).

However, the rates should not be less than \$250/hr, as Defendant contends. Doc. #610 at 14. Partners from the Demchak Firm actively participated in discovery, conducted a number of

depositions and examined 11 witnesses at trial. Their contributions provided valuable second-chair assistance to Mr. Garrigan. The court will apply the hourly market rate for all partners at the Demchak Firm at \$400/hr, the same market rate charged by Mr. Garrigan. This includes Teresa K. Demchak, Morris J. Baller, David A. Borgen, and Linda M. Dardarian.

### 3. Associates, Law Clerks, Paralegals and Case Clerks

The Garrigan Firm billed time for a paralegal, and the Demchak Firm billed time for associates, a law clerk, senior paralegals, paralegals, and case clerks. The individuals billed between \$110/hr and \$465/hr. Plaintiffs fail to provide any affidavits from attorneys practicing in the Eastern District of Texas setting out reasonable ranges for associates, law clerks, paralegals, or case clerks. The court is left with the representations made by Defendant and the attorneys who provided affidavits to Defendant.

Defendants provide specific rate information from three different attorneys located in the Eastern District of Texas — Curtis Fenley, Larry Germer, and Richard Alderman. The maximum rates charged by the attorneys for associates is \$125 at Mr. Fenley's firm and \$160 at Mr. Germer's firm. Defendants' associates are qualified and the court will use the \$160/hr fee set by Mr. Germer's firm as the appropriate market rate for associates.

The Garrigan Firm billed its paralegal at \$125/hr. As discussed above, the Garrigan Firm billed its partner's time at the market rate. The court likewise finds that the Garrigan Firm billed its paralegal, Ms. Davis, at the appropriate market rate for this complex case, given her extensive experience, and will use this \$125/hr fee as the market rate for the hours billed by The Demchak Firm's "Senior Paralegals." The other paralegals and case clerks will be billed at the rate requested, as these lower rates appear commensurate with their experience and responsibilities.

In sum, the court determines the rate to be applied in the lodestar calculation for each individual's time as follows<sup>5</sup>:

For the Garrigan Firm:

<b>Individual</b>	<b>Rate (\$/hr)</b>
Timothy Garrigan (Partner)	400
Anne Davis (Paralegal)	125

For the Demchak Firm:

<b>Individual</b>	<b>Rate (\$/hr)</b>
Teresa K. Demchak (Partner)	400
Morris J. Baller (Partner)	400
David A. Borgen (Partner)	400
Linda M. Dardarian (Partner)	400
Darci E. Burrell (Associate)	160
Joshua G. Konecky (Associate)	160
Meetal Jain (Associate)	160
Nina Rabin (Associate)	160
James Kan (Associate)	160
Jennifer A. Stalzer (Law Clerk)	125
Lisa M. Dungan (Senior Paralegal)	125
Scott G. Grimes (Senior Paralegal)	125
Lynn E. Sagramoso (Senior Paralegal)	125
Damon Valdez (Senior Paralegal)	125
Wendy E. Whitt (Senior Paralegal)	125

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<sup>5</sup>Plaintiffs' counsel provided a billing record as Appendix 1 to its motion. Doc. #599-2.



May G. Rafanan (Paralegal)	100
Mark Thurston-Baller (Paralegal)	100
Natasha Gurtner (Paralegal)	100
Charlotte Manapat-Nguyen (Paralegal)	100
Lena Borgen (Case Clerk)	73
Rebekah Stern (Case Clerk)	73

#### D, Lodestar Calculation

The Lodestar is calculated by multiplying the rate for each individual by the number of hours worked by that individual.

<b>Individual</b>	<b>Rate (\$/hr)</b>	<b>Net Hours</b>	<b>Billable Amount</b>
Timothy Garrigan	400	3213	\$1,285,200.00
Anne Davis	125	407	\$50,875.00
Teresa K. Demchak	400	4,625	\$1,850,000.00
Morris J. Baller	400	1,066.4	\$426,560.00
David A. Borgen	400	29.8	\$11,920.00
Linda M. Dardarian	400	325.4	\$130,160.00
Darci E. Burrell	160	2,317.1	\$370,736.00
Joshua G. Konecky	160	882.4	\$141,184.00
Meetal Jain	160	67.8	\$10,848.00
Nina Rabin	160	308.9	\$49,424.00
James Kan	160	129.6	\$20,736.00
Jennifer A. Stalzer	125	27.6	\$3,450.00
Lisa M. Dungan	125	1,203.5	\$150,437.50
Scott G. Grimes	125	584.4	\$73,050.00
Lynn E. Sagramoso	125	31	\$3,875.00

Damon Valdez	125	30	\$3,750.00
Wendy E. Whitt	125	159.2	\$19,900.00
May G. Rafanan	100	272.9	\$27,290.00
Mark Thurston-Baller	100	64.3	\$6,430.00
Natasha Gurtner	100	656.9	\$65,690.00
Charlotte Manapat-Nguyen	100	50.2	\$5,020.00
Lena Borgen	73	41.6	\$3,036.80
Rebekah Stern	73	419.5	\$30,623.50
<b>Total</b>			<b>\$4,740,195.80</b>

#### **E. Adjustment Due to the *Johnson* Factors**

Once a claimed hourly rate and the claimed number of hours has been found to be reasonable, the product is presumed to be a reasonable fee. *Blum*, 465 U.S. at 897, 104 S. Ct. at 1548. Plaintiff has the burden of proving that the case is exceptional and consideration of the *Johnson* factors warrants an upward adjustment. *Watkins*, 7 F.3d at 457; *Rutherford*, 197 F.3d at 192-93.

Exceptional results are generally reflected in the lodestar. *Blum*, 465 U.S. at 899, 104 S.Ct. at 1549. It is rare that an applicant can show results that transcend what can be expected given the hourly rates and hours expended. *See Delaware Valley* 478 U.S. 546, 567, 106 S.Ct. 3088, 3099 (1986); *Shipes v. Trinity Industries*, 987 F.2d 311, 322 (5th Cir. 1993). In this case counsel charged high hourly rates, commensurate with their experience, and spent a great deal of time on the case. They did not prevail on every issue but did achieve a significant benefit. They have provided insufficient specific evidence of startling or exceptional results or adverse circumstances that would overshadow or dwarf the presumptively correct lodestar.

### 1. The Degree of Success Obtained

Plaintiffs were not successful on all of their claims. Plaintiffs did not succeed on an initial assignment claim, which was factually distinct from the promotion claim, or the disparate treatment claims that Plaintiffs advanced in the district court and on appeal. Nevertheless, Plaintiffs obtained significant relief. Plaintiffs will obtain both monetary and injunctive relief.

While the specific monetary and injunctive relief has not yet been crafted, the amount of monetary award does not impose a presumptive limit on Plaintiffs' recovery of attorneys' fees. *See, e.g., Volk v. Gonzalez*, 262 F.3d 528, 535 (5th Cir. 2001); *see also, City of Riverside v. Rivera*, 477 U.S. 561, 574 (1986); *Green*, 284 F.3d at 663 (applying Riverside's holding in Title VII case).

Plaintiffs were ultimately successful on some, but not all, of their initially asserted claims, achieving significant results. This factor is neutral and does not suggest an upward or a downward adjustment.

### 2. The Other *Johnson* Factors

Defendant argues that none of the other factors suggest an upward adjustment. Plaintiffs likewise do not contend that any of the other factors support an increase in the award, merely maintenance of the award. The court agrees with the parties and similarly finds that none of the other factors suggest either an upward or a downward departure as this is not an exceptional case. The lodestar's strong presumption of reasonableness holds and the court will not adjust the lodestar. *Watkins*, 7 F.3d at 457. For completeness, the court will briefly discuss the other factors.

*a. Time and labor required*

This case involved significant time and labor expended over more than a decade. Attorneys' hours and labor were included in the lodestar calculation. No additional adjustment is required to fully compensate the attorneys for the work performed.

*b. Novelty and complication of the issues, skill required, attorney's customary fee.*

These factors are all reflected in the number of hours billed and the reasonable hourly fee. *City of Burlington v. Dague*, 505 U.S. 557, 562-63, 112 S.Ct. 2638, 2641 (1992). Any adjustment to this factor would constitute double counting. Similarly, no enhancement due to this case being taken on a contingent fee is required. *Id.* at 566-67, 2643. This factor supports awarding the lodestar, without adjustment.

*c. Whether the attorney had to refuse other work to litigate the case*

This case involved over 10,000 attorney and paralegal hours. This case likely prevented the attorneys from pursuing other work. On the other hand, this case also provided the opportunity to bill many more hours than most other cases. These issues are reflected in the lodestar calculation in the number of hours billed and the hourly rate. There is no evidence that either firm lost clients because of a conflict or because the case was viewed undesirable. These factors support awarding the lodestar, without adjustment.

*d. Whether the client or case circumstances imposed any time constraints*

This case did not present any particular time constraints besides the large amount of time and labor required as discussed above. This factor supports awarding the lodestar, without adjustment.

*e. Attorney's experience, reputation, and ability*

Attorneys from the Garrigan Firm and the Demchak Firm are comparable to those practicing employment and complex litigation in the Eastern District of Texas. The court set rates for attorneys commensurate with this finding. This factor supports awarding the lodestar, without adjustment.

*f. Whether the case was "undesirable"*

This case was taken on a contingency fee basis. Declaration of Timothy Gerrigan at ¶ 7. From the beginning named Plaintiffs desired to pursue a class action. *Id.* Although these may present difficulties, the case is no more or less desirable than any other employment case in which an attorney is paid a contingent fee. Any additional complexity from the pursuit of a class action is reflected in a larger number of hours being billed compared to non-class action employment cases. This factor supports awarding the lodestar, without adjustment.

*g. Nature and length of relationship with the clients*

There is no evidence that counsel knew Plaintiffs prior to the litigation of this case or have represented any Plaintiff in another matter. The decision to represent Plaintiffs was an isolated decision and this factor does support deviation from the lodestar.

*h. Awards in similar cases*

The parties do not present any comparable case and the court does not find any. However, the calculated lodestar, \$4,737,714.30, is comparable to the amount billed by Defendants' counsel in this case, \$4,864,923.37. Counsel for both sides dealt with the same set of facts and legal issues, and it would not be unusual if similar attorneys' fees were generated. The court finds the comparison a useful method of cross-checking the amount requested by

Plaintiffs' counsel. *See* Alan Hirsch & Diane Sheehey, Awarding Attorneys' Fees and Managing Fee Litigation 108 (Federal Judicial Center 2d ed. 2005). This factor supports award of the lodestar, without enhancement.

### **G. Other Costs**

#### **1. Prior to January 15, 2005**

Judge Cobb awarded Plaintiffs' counsel \$127,658.60 in taxable costs and \$840,129.72 in litigation related expenses. Defendant now objects to a portion of this amount — the litigation costs for work done by Richard Drogin. Doc. #610 at 22. No claim of error in this regard was made in Defendant's Notice of Appeal [Doc. #557], and the Circuit Court did not indicate that this was one of the issues to be considered on remand. The court finds that this point has been waived. Alternatively, Defendant's only argument — that Dr. Drogin spent time analyzing data pertaining to issues on which Plaintiff did not ultimately prevail — is not well taken. Plaintiff achieved significant results including a substantial monetary award. Defendant is liable for the full amount of litigation related expenses previously awarded.

#### **2. Costs from January 15, 2005 through December 31, 2008**

Plaintiffs filed a Supplemental Bill of Taxable Costs requesting \$12,903.66 in costs. [Doc. #600]. They also requested \$92,474.12 in other litigation related costs and expenses. Doc. #599 at 1. Defendant did not respond to Plaintiffs' Supplemental Bill of Taxable Costs or Plaintiffs' request for additional litigation related expenses and is assumed not to oppose either. L.R. CV-7(d). The court finds these costs and expenses reasonable and awards Plaintiffs the additional amount of \$12,903.66 in taxable costs and \$92,474.12 in other litigation related costs and expenses.

#### IV. Conclusion

This case was tried before Judge Cobb who found that Lufkin Industries has engaged in discriminatory practices; entered an injunction; and awarded monetary damages, attorneys' fees, and litigation expenses. The Circuit Court upheld the liability findings as to promotions and remanded not with instruction to eliminate the injunction, but to word it more clearly. The awards of monetary damages and attorneys' fees were not to be canceled but were to be recalculated. No point of error raised by Defendant concerning the calculation of litigation expenses or costs was mentioned in the Circuit Court's opinion, and that part of Judge Cobb's order was not reversed.

Therefore this court finds that even though a final judgment on the merits has not been entered, Plaintiffs are the prevailing party. *See Texas State Teachers Ass'n v. Garland Independent School Dist.*, 489 U.S. 782, 791-93, 109 S.Ct. 1486, 1493-94 (1989); *Walker v. City of Mesquite, TX*, 313 F.3d 246, 249-50 (5th Cir. 2002). They have achieved significant results in terms of injunctive relief and a monetary award regardless of the precise wording of the final injunction or the exact amount eventually awarded.

The fees, expenses and costs set out in this order "represents compensation for work that is compensable no matter what the course of subsequent events." *See Shipes v. Trinity Industries, Inc.*, 883 F.2d 339, 344 (5th Cir. 1989). In accordance with Fed. R. Civ. P. 54 (b), the court determines there is no just reason for further delay in the entry of this order,<sup>6</sup> and the

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<sup>6</sup>This case has been pending for twelve years. Counsel for Defendants have been paid in accordance with whatever schedule they chose to agree upon, while counsel for Plaintiffs have been uncompensated and have advanced substantial sums of their own money. It appears to the court that Defendants have had little interest in correcting their discriminatory practices before, and even after, the Circuit Court affirmed Judge Cobb's finding of liability. Further delay would

accompanying judgment shall be a final appealable judgment as to these fees, expenses, and costs.

IT IS THEREFORE ORDERED that Plaintiffs' Motion for an Interim Award of Reasonable Attorneys' Fees, Costs, and Expenses [Doc. #599] is **GRANTED IN PART**, and Defendant Lufkin Industries, Inc. shall pay Plaintiffs \$4,740,195.80 for attorneys' fees and \$932,603.84 in litigation related expenses. (This amount includes the \$840,129.72 previously awarded by Judge Cobb.)

IT IS FURTHER ORDERED that Plaintiffs' Supplemental Bill of Taxable Costs [Doc. #600] is **APPROVED**, and Defendant Lufkin Industries, Inc. shall pay Plaintiffs \$140,562.26 in taxable costs. (This amount includes the \$127,658.60 in taxable costs previously awarded by Judge Cobb.)

So **ORDERED** and **SIGNED** this **2** day of **April, 2009**.



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Ron Clark, United States District Judge

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neither advance justice nor further Congressional intent in encouraging qualified counsel to take on such complicated and time consuming cases.



**\*\*NOT FOR PRINTED PUBLICATION\*\***

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF TEXAS  
LUFKIN DIVISION

SYLVESTER MCCLAIN, on his own and on	§	
behalf of a class of similarly situated persons,	§	
et al.,	§	
	§	Civil Action No. 9:97-CV-063
<i>Plaintiffs,</i>	§	
	§	
v.	§	JUDGE RON CLARK
	§	
LUFKIN INDUSTRIES, INC.	§	
	§	
<i>Defendant.</i>	§	

**JUDGMENT Re: ATTORNEYS' FEES**

For the reasons stated in the Order Re: Attorneys' Fees entered contemporaneously with this judgment, the court has determined that there is no just reason for further delay in entry of this judgment. Pursuant to Fed. R. Civ. P. 54(b) and for the reasons stated in said Order, the court directs the entry of this judgment as a final judgment as to Plaintiffs' claims for attorneys' fees, litigation expenses, and costs of court incurred prior to January 1, 2009.

IT IS THEREFORE ORDERED that Defendant Lufkin Industries, Inc. shall pay Plaintiffs \$4,740,195.80 for attorneys' fees; \$932,603.84 in litigation related expenses; and \$140,562.26 in taxable costs.

IT IS FURTHER ORDERED that post-judgment interest on the above sums shall be calculated pursuant to 28 U.S.C. § 1961 at the rate of 0.59%.

IT IS FURTHER ORDERED execution shall issue if the above sums are not paid within 21 days of the entry of this Order. The court retains jurisdiction of this matter for the purposes

set out in the order of remand concerning Plaintiffs' other claims and for receiving and ruling on a further application for attorneys' fees, costs, and expenses incurred by Plaintiffs' counsel on and after January 1, 2009, pursuant to a schedule to be determined after further proceedings in this matter.

So **ORDERED** and **SIGNED** this **2** day of **April, 2009**.



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Ron Clark, United States District Judge