I. INTRODUCTION.

Plaintiffs Chris Conanan, Willitta Hawkins and Leonard C. Glenn, individually and on behalf of all others similarly situated ("Plaintiffs," "Class Representatives" or "Named Plaintiffs"), respectfully submit the Proposed Consent Decree and Memorandum in Support of Motion for Final Approval of Consent Decree. A copy of the settlement agreement (the "Consent Decree," "Settlement Agreement, " or "Settlement") is attached hereto as Exhibit 1. The above Plaintiffs hereby move and apply for final approval of the Settlement by this Court pursuant to Rule 23(e) of the Federal Rules of Civil Procedure. In addition, Plaintiffs move for class certification pursuant to Fed.R.Civ.P. 23(b)(2), or in the alternative, pursuant to Fed.R.Civ.P. 23(b)(2) and (b)(3).

After almost a decade of litigation and mediation, Plaintiffs are pleased to submit to the Court a settlement agreement which is fair, adequate and reasonable and is the product of good faith, arms-length negotiations between the parties. After vigorous advocacy and negotiation, the parties have agreed on a settlement that achieves the equitable relief sought, in addition to significant monetary relief, for over 3,000 current and former African-American employees of Defendant, Federal Deposit Insurance Corporation ("FDIC").

II. FINDINGS OF FACT.

The Court makes the following factual findings:

A. Litigation.

The Proposed Consent Decree resolves over nine years of litigation and mediation between the parties over promotions and other selections of African-American employees at the FDIC. This litigation was originated by Mr. Conanan in June 1992, when he sought equal

employment opportunity ("EEO") counseling on behalf of all African-American FDIC employees, alleging racial discrimination in the awarding of promotions and in other employment practices in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e-16 *et seq.* ("Title VII"). The parties attempted mediation, leading Mr. Conanan, Ms. Hawkins and then-FDIC employee Marvin Gordon, to file a formal administrative class complaint on November 8, 1993. Plaintiffs sought declaratory, injunctive and monetary relief on behalf of themselves and others similarly situated for claims arising on or after May 13, 1992.

On December 8, 1993, the FDIC forwarded the complaint to the Equal Employment Opportunity Commission ("EEOC"), where it was assigned to Administrative Judge Veronica Venture. Judge Venture recommended certification of two subclasses of employees and recommended that Mr. Conanan, Ms. Hawkins and Mr. Gordon serve as Class Agents.[1] The EEOC's Office of Federal Operations ("OFO") ordered certification of a single class of African-American current and former employees challenging promotional and other selection practices and concluded that the Class Agents were adequate class representatives. Consequently, the FDIC issued notice of the class complaint.

Upon the dissemination of notice to the Class, a dispute between the parties about the definition of the Class arose and was brought before OFO and then later Judge Venture. In December 1999, while the dispute over the class definition was still pending before Judge Venture, the parties agreed to engage in mediation.

B. Settlement Negotiations.

[1] During the administrative EEO process, individuals who represent the Class are referred to as "Class Agents." Mr. Gordon has since left the FDIC and was replaced as a Class Agent by Leonard Glenn for the second mediation and in this action.

On February 18, 2000, the parties began mediation. During an eight month period, the parties engaged in extensive mediation sessions, consisting of several dozen meetings and negotiating sessions, in the course of which the Plaintiffs, Class Counsel and Plaintiffs' expert obtained and examined hundreds of pages of documents and a computer database consisting of FDIC work force data. Additionally, at several mediation sessions and in telephone conversations, FDIC personnel staff presented information regarding relevant personnel policies. The parties have engaged in over sixty (60) hours of negotiation, often meeting for days at a time to make presentations and debate issues. This Proposed Consent Decree is the result of these negotiations.

During the mediation sessions, the Class was represented by Mr. Conanan, an FDIC attorney, and Ms. Hawkins, a computer specialist, both of whom had been designated as Class Agents by the EEOC. In addition, Mr. Leonard Glenn was added as a representative of the Class at the mediation because, as a Bank Examiner in the New York region of the Division of Supervision ("DOS"), the division with the largest number of employees, he represented the perspective of employees located at FDIC regional and field offices. In addition, the Class was represented by Joseph M. Sellers and Suzette M. Malveaux, of Cohen, Milstein, Hausfeld & Toll, P.L.L.C. and Avis E. Buchanan, of the Washington Lawyers' Committee for Civil Rights and Urban Affairs, the latter of which had also represented the Class in the administrative proceedings before the EEOC. Class Counsel have extensive experience in the area of employment discrimination class actions and have served as class counsel in several dozen private and federal class actions and civil rights cases. The FDIC appointed two senior executives to represent the agency in mediation: D. Michael Collins, the Director of the Office of

Diversity and Economic Opportunity ("ODEO") and Michael Zamorski, the Deputy Director of the FDIC's largest organization, the Division of Supervision. The FDIC was also represented by attorneys Thomas J. Sarisky, Lisa M. Villarreal, Cathy A. Costantino and Anthony F. Pagano, III.

The parties retained a leading authority in the field of dispute resolution and mediation, Linda Singer, Esq., of ADR Associates, who presided over and guided the parties through every stage of the mediation process. In order to properly and fully evaluate FDIC workforce data, Plaintiffs retained Dr. Janice Madden, a labor economist at Econsult, and the FDIC retained Dr. Bernard Siskin, a statistician at the Center for Forensic Economic Studies, both of whom have extensive experience in EEO class actions. They conducted statistical analyses of workforce data provided by the FDIC, to determine the nature and extent of any disparities in promotions and other selection practices between African-Americans and similarly situated white FDIC employees. The analyses they employed were of the type widely accepted in assessing class-wide employment discrimination claims and were used to formulate the positions the parties took in negotiations. While the parties analyzed the same database, they vehemently debated the inferences that could be drawn from the results of each expert's reports.

The parties also debated whether certain personnel policies and procedures of the FDIC contributed to, or permitted, the discrimination alleged by Plaintiffs. In order to assist in the design and implementation of reforms to these policies and practices, the parties agreed jointly to retain a renowned industrial psychologist, Dr. Wayne Cascio. Dr. Cascio is a professor of management at the Graduate School of Business Administration, University of Colorado at Denver and a national authority in the validation of employment selection criteria. *See*

Declaration of Wayne Cascio, attached as Exhibit 3.

Extensive discussions took place between the parties throughout the year 2000. By early autumn of 2000, the parties reached an agreement in principle to settle the litigation in its entirety, and executed term sheets setting forth the terms of the agreement reached during the negotiation of monetary and equitable relief. This agreement was memorialized and set forth more fully in the attached Proposed Consent Decree. On November 21, 2000, the terms of the proposed settlement were approved by the FDIC's Board of Directors.

Throughout the mediation, as well as before it commenced, the Class Representatives and Class Counsel engaged in extensive communications with members of the Class. The Class Representatives cumulatively have over 50 years of experience at the FDIC and have been tireless advocates for African-Americans at the Corporation, as set forth more fully in Plaintiffs' Memorandum in Support of Joint Motion for Preliminary Approval of Consent Decree, filed May 4, 2001, at 5-7. Throughout the course of the mediation that led to the Proposed Consent Decree, the Class Agents spoke with various Class Members, gathering information and insights about the nature of their concerns, the practices they felt were discriminatory and their recommendations for changes in personnel policies and procedures.

Additionally, Class Counsel and the Class Agents used a variety of means to facilitate ongoing communications with concerned members of the Class, both during the mediation process and after a settlement was reached. Class Counsel and the Class Agents held numerous meetings with the Class, giving detailed, in-person presentations about the Proposed Consent Decree at meetings held at FDIC headquarters in Washington, D.C., as well as at FDIC facilities in Arlington, Virginia; Dallas, Texas; Memphis, Tennessee; and Atlanta, Georgia. Together

these meetings lasted approximately 15 hours. Hundreds of Class Members attended and received documents summarizing the Proposed Consent Decree and were given an opportunity to ask questions and make comments. Class Counsel and the Class Representatives also made several videotaped presentations, describing the settlement and the monetary distribution formula, that were transmitted to Class Members currently employed by the FDIC, to their work place computer, and were mailed to other Class Members who requested them. Class Counsel established a toll-free telephone number where Class Members could leave a message that was returned by an attorney or a paralegal, and maintained a website on which they posted various documents of interest to the Class Members, including the Consent Decree and exhibits. The toll-free number was actively used and led to Class Counsel's fielding several hundred calls. The FDIC also provided relevant information and pertinent documents on its internal and external websites and allowed Class Counsel to use the FDIC's global e-mail to keep the Class apprised of important developments.

Class Counsel and the Class Representatives also held two additional half day meetings with the Class at headquarters in Washington, D.C. and at Virginia Square[2], at the direction of the Court, to answer questions and address concerns raised by Class Members at the preliminary approval hearing held on May 16, 2001. The Court granted preliminary approval of the Consent Decree on May 16, 2001.

C. Summary of the Settlement.

[2] Most of the FDIC's current African-American employees work in these two D.C. area locations.

This settlement calls for substantial changes in the FDIC's policies and procedures and provides for a payment of monetary relief to the Class in an amount that is larger than any other known settlement of a race discrimination class action against a federal agency.

While negotiation of these reforms was triggered by claims of race discrimination against African-American employees, these measures are intended to benefit all FDIC employees by promoting fairness, consistency and objectivity in the administration of employment practices. No quotas are provided and no employee would be displaced from his or her job as a result of any provision of the Consent Decree.

The major terms of the Consent Decree are summarized below:

1. <u>Changes In Personnel Procedures And Practices</u>.

- Under the supervision of (and after training by) a neutral expert, the FDIC will analyze all jobs in clusters to ensure that promotions and other selections for positions are based on legitimate, merit-based criteria. These cluster job analyses will provide a solid foundation for the creation of legitimate, merit-based vacancy announcements, position descriptions and crediting plans. The neutral expert will randomly monitor both the cluster job analyses and the vacancy announcements, position descriptions and crediting plans based on them. *See Cascio Declaration* at ¶¶ 4-6, Ex. 3.[3]

- Accountability in the competitive promotions process will be greatly enhanced.

    - Employees who do not meet minimum qualification requirements for any vacancy for which they apply will be given notice and an opportunity to supplement their applications. Merit Promotion Panels will usually include members from divisions other than the division in which the vacancy arises, and will be instructed in equal opportunity and conflict of interest rules.

    - The FDIC will standardize the interviewing process and develop written interview guidelines. If one candidate is interviewed for a job, all other candidates must be interviewed, up to a total of nine interviewees.

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[3] In fact, Dr. Cascio has already commenced such work. *See Cascio Declaration* at ¶ 8, Ex. 3.

- The FDIC will develop written guidelines regarding the cancellation or lapse of vacancy announcements or the failure to fill positions advertised in vacancy announcements. Supervisors will be required to provide a written explanation for any of these actions and to obtain approval from their supervisor.

- Selecting officials must prepare written justifications stating their reasons for selecting the successful candidate(s) from among the candidates referred.

- Accountability in the non-competitive promotions process will also be greatly enhanced.

  - The FDIC will develop and use written guidelines to ensure that any benchmarks and tests used in career ladder promotions are based on merit and consistent with the job description and cluster job analyses.

  - Rules governing the awarding of career ladder promotions will be standardized.

  - Employees whose career ladder promotions are to be delayed beyond the date when they have met the minimum qualifications for a career ladder promotion will be provided with 30 days advance notice of the delay, including the reason for the delay and any steps which must be taken by the employee to achieve the promotion.

  - Employees will receive written explanations for decisions made as a consequence of a desk audit.

- Steps will be taken to increase the availability of career enhancement opportunities and desirable job assignments to all employees.

  - The FDIC will develop written guidelines that instruct supervisors in how to fairly and equitably distribute career enhancing opportunities among employees. Supervisors will be required to offer each employee an opportunity to develop Career Development Plans, and give employees an opportunity to meet with them annually to discuss job assignments.

  - The FDIC will expand and strengthen the Career Development Program by distributing information, encouraging its use, and monitoring its success.

  - The FDIC will be required to publicize job details of more than 60 days and provide employees with an opportunity to apply for such details.

- The FDIC (in some instances with the help of a neutral expert) will train and educate FDIC personnel specialists, managers and supervisors in the techniques and skills necessary to implement the changes in FDIC policies and personnel procedures.

- Employees will have access to FDIC training that will enhance their ability to take advantage of employment opportunities. The FDIC will also provide and promote formal mentoring and expression of interest programs.

2. Monitoring FDIC's Compliance With Changes In Personnel Procedures.

- To ensure the FDIC's compliance with the Consent Decree, the Decree will be adopted as an order of the United States District Court for the District of Columbia and enforced as such. The Court will retain jurisdiction over the Consent Decree for 3 years.

- In the event that there is a material breach of the Consent Decree or differences in its interpretation, the parties will first attempt to resolve their differences through an alternative dispute resolution process. In the event that negotiation and mediation are unsuccessful, either party may apply to the Court for appropriate relief.

- The FDIC will take steps to ensure its compliance with the Consent Decree, including (i) providing the Class with access to the Director of the FDIC's Office of Diversity and Economic Opportunity ("ODEO") or his designee, who shall be the primary point of contact regarding issues related to compliance and monitoring; (ii) holding periodic meetings between Class Members and the FDIC Chief Operating Officer or Chief Financial Officer throughout the term of the Consent Decree; and (iii) establishing a new Personnel Compliance Officer position to monitor personnel-related practices for compliance and uniformity.

- The FDIC will provide Class Counsel with statistical information about the workforce and promotions, and information pertaining to equal employment opportunity requirements and tools for evaluating compliance with the Consent Decree.

3. Monetary Payments.

- The Consent Decree requires the FDIC to pay, among other amounts, the sum of Eleven Million Five Hundred Thousand Dollars ($11,500,000), which will be deposited into a settlement fund and paid to Class Representatives and to all other Class Members in accordance with the distribution formula, attached as Exhibit 6 to the Consent Decree, as compensation for lost earnings and compensatory damages claims. To be eligible to receive a monetary award, Class Members must have completed and timely filed a Claim Form, a copy of which is attached to the Consent Decree as Exhibit 3.

    - This settlement fund is divided into a Back Pay Fund, which provides monetary relief for back pay, front pay, employment benefits and/or interest claims, and a Damages Fund, which provides monetary relief for emotional distress, mental

anguish, and pain and suffering claims.

- The calculation of the amounts due to each Class Member will be handled by the Plaintiffs' Expert, and the administration and distribution of the monetary amounts will be handled by the Claims Administrator. The amount due to each Class Member will be determined by the distribution formula, attached as Exhibit 6 to the Consent Decree.

- Each Class Member was notified of his or her proposed monetary award and given the opportunity to seek adjustment of that award if he or she believed that the award determination has been made by the Plaintiffs' Expert in error. *See* Notice of Individual Monetary Award, attached to the Consent Decree as Exhibit 4.

- The Consent Decree provides for Defendant to pay the six persons[4] who have acted as class representatives over the course of the litigation an additional sum totaling Five Hundred Thousand Dollars ($500,000) in recognition of their diligent prosecution of this case.

- The Consent Decree provides for the defendant to pay to the attorneys representing the Class the sum of Two Million Dollars ($2,000,000) for attorneys' fees and costs incurred in litigating this action from 1992 up to the date the Court enters an Order granting Final Approval of the Consent Decree.

- The Consent Decree provides for the defendant to pay approximately One Million Three Hundred Ninety-Five Thousand Dollars ($1,395,000) for costs associated with implementing and monitoring the Consent Decree and employer taxes on payments to Class Members.

D. Notice and the Claims Process Following Preliminary Approval.

After careful consideration of the parties' Joint Motion for Preliminary Approval of Consent Decree and Memorandum in Support with exhibits, and the views expressed by the parties and Class Members at the hearing held before the Court on May 16, 2001, the Court issued a ruling from the bench giving preliminary approval of the Consent Decree. *See Transcript of Status Hearing Before the Honorable Ellen Segal Huvelle*, United States District Court (May 16, 2001), at 110 (lines 23-25), 111 (lines 1-6), 112 (lines 9-16) and 113 (lines 9-10),

[4] They are Chris J. Conanan, Willitta Gordon Hawkins, Leonard C. Glenn, Marvin G. Gordon, Jacqueline K. Taylor and Charles Thompson.

attached as Exhibit 4.[5] The Court also approved the plan for the issuance of notice set forth in the Consent Decree as being sufficient under Rule 23(e) of the Federal Rules of Civil Procedure and directed the parties to issue the Notice of Pendency of Class Action and Proposed Consent Decree and Notice of Fairness Hearing in the manner set forth in the Consent Decree. *See Order* (May 16, 2001).

1. Dissemination of Notice to the Class.

Class Counsel retained Settlement Services, Inc., ("SSI" or the "Claims Administrator") to disseminate the notice and administer the claims process set forth in Section VI of the Consent Decree. Created in 1992, SSI is owned and managed by an attorney who has over twenty-five years experience in class action and fair employment/civil rights law and has been associated with some of the largest employment class action cases in the country. *See Settlement Services, Inc. Brochure* ("SSI") attached as Exhibit 5. SSI has played an integral role in this settlement, including designing and disseminating the various notices, fielding hundreds of inquiries from Class Members, creating a database of ongoing contacts and managing the claims process.

Pursuant to the Consent Decree, on May 27, 2001, SSI mailed by first-class mail, United States Postal Service, the Notice of Pendency of Class Action and Proposed Consent Decree to 1,858 employees identified as Class Members who are former employees of the FDIC. *See Declaration of Settlement Services, Inc.* at ¶6 ("SSI Declaration"), attached as Exhibit 6. Since a significant number of former employees had left the agency many years ago, the FDIC's database

[5] That same day, the Court issued an order preliminarily approving the settlement as fair and reasonable to the class as a whole and requiring Class Counsel to hold two additional informational sessions for those interested Class Members in the D.C. and Virginia area. *See* Order (May 16, 2001).

of last known addresses contained a number of outdated addresses. As a result, Class Counsel determined that it was prudent for SSI to send the notices and claim forms to addresses procured through a tracing mechanism. The FDIC provided SSI with the social security numbers of former employees who were Class Members and SSI received the most recent possible address for each social security number from the Trans Union Credit Bureau. *Id.*[6]

SSI was able to contact former employees through the use of the traced addresses. Only about 10% of the notices and claim forms sent to former employees were returned to SSI as undeliverable, most of which came within approximately three weeks after they were initially sent. Shortly thereafter, in mid June 2001, SSI resent the notices and claim forms returned undeliverable to the addresses provided by the FDIC or Class Counsel. The majority of those did not come back as undeliverable. Therefore, approximately 95% of those former employees who were sent notices and claim forms had notices and claim forms that were not returned undeliverable. Moreover, SSI also mailed notices and claim forms to anyone who called its toll-free number and requested them. Based on SSI's extensive experience in disseminating notices in employment class actions, the notice provided in this case was successful and well within the norm of what has been considered sufficient. *See SSI Declaration* at ¶¶ 7-9, Ex. 6. In fact, in its nine year history, SSI has never participated in a notice procedure that was deemed inadequate by a court. *See SSI Declaration at ¶ 9*, Ex. 6.

On May 29, 2001, the FDIC sent via e-mail the Notice of Pendency of Class Action and Proposed Consent Decree to all current employees (the "global e-mail"), informing them of the

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[6] This Court issued a protective order, signed by Class Counsel, limiting the use of all sensitive personnel data provided by the FDIC to Class Counsel in this case, to protect employees' privacy rights.

class action and proposed settlement. *See FDIC global e-mail Notice of Pendency of Class Action and Proposed Consent Decree of May 29, 2001* (the "May 29, 2001 FDIC global e-mail"), attached as Exhibit 7. The global e-mail also informed all current employees that Class Members who were current employees should have already received their own e-mail with pertinent information and advised any Class Member who had not received such correspondence to contact Class Counsel immediately. *See id.* On May 24, 2001, the FDIC sent via e-mail the Notice of Pendency of Class Action and Proposed Consent Decree, the Notice of Monetary Distribution Formula and a Claim Form, to current employees who are Class Members. *See FDIC email to Class of May 24, 2001* (the "May 24, 2001 FDIC Class e-mail"), attached as Exhibit 8.

2. Processing the Claim Forms and Opt-Outs.

Pursuant to Section II.D.1(b) of the Consent Decree, Class Members were afforded the opportunity to opt out of the Class and the settlement by expressing their intention in writing to the Court by July 16, 2001, as set forth in Notice of Pendency of Class Action and Proposed Consent Decree. An overwhelming majority of the Class chose to participate in the monetary relief of the settlement. The number of opt-outs received by the Court fell short of the number placed under seal, which would have triggered the FDIC's right to withdraw from the settlement. *See* Section II.D.1(b) of Consent Decree. Out of approximately 3,144 Class Members, 2,103 or 67% of the class submitted Claim Forms by the July 16, 2001 deadline. *See Declaration of Econsult* at ¶ 7 ("Econsult Declaration") attached as Exhibit 9.

SSI formulated and carefully implemented a procedure for accepting and processing only those Claim Forms that were submitted timely. Claim Forms were sent to a post office box assigned to this case and checked daily by SSI. SSI date stamped each Claim Form to show the

date of receipt and stapled it to the envelope in which it came. Pursuant to Section VI of the Consent Decree and the Claim Form, Claim Forms had to be returned to SSI postmarked no later than July 16, 2001 to be deemed valid. The postmark for each Claim Form received by SSI after July 16, 2001 was initially reviewed by an SSI paralegal. If it was clear that the Claim Form was timely, it was sent to SSI's data entry department which confirmed its timeliness and processed the Claim Form. If it was unclear whether the Claim Form was timely, an SSI supervisor reviewed it, and at times consulted with Class Counsel to make the determination. The names of those deemed timely at this stage were sent to SSI's data entry department, which confirmed the timeliness and processed the Claim Form. SSI mailed the Notice of Individual Monetary Award to all those who submitted late Claim Forms, indicating that they were not eligible for monetary relief because of the untimeliness of their Claim Form. *See SSI Declaration* at ¶¶ 10, 11, 14, Ex. 6.

Fifty-four Class Members sought to submit Claim Forms postmarked after July 16, 2001, the deadline set forth in the Consent Decree and Claim Form. *See SSI Declaration* at ¶ 13, Ex. 6. The Consent Decree does not provide for any exceptions to be made for late Claim Forms and the Claim Form states in bold, capital, underlined letters that Claim Forms must be mailed to SSI and postmarked by July 16, 2001 to be accepted. *See Claim Form*, attached as Exhibit 3 to the Consent Decree. Consequently, Class Members who asked SSI or Class Counsel to accept their late Claim Forms were informed, by telephone or in writing, that the settlement did not provide for such exceptions. *See SSI Declaration* at ¶ 14, Ex. 6. Those who sought an exemption from the timeliness requirement prior to the October 31, 2001 deadline were advised of the option to file a comment with the Court, in accordance with the procedures set forth in the Notice of

Fairness Hearing. *See SSI Declaration* at ¶14, Ex.6.

Throughout the claims process, SSI maintained a toll-free telephone number that was staffed from 9:00 a.m. to 5:30 p.m. (Eastern Time), Monday through Friday, and fielded hundreds of telephone calls from Class Members. This number was provided to the Class on the Notice of Pendency of Class Action and Proposed Consent Decree, as well on the websites of both Class Counsel and the FDIC. SSI collected contact information for each person who called SSI, provided information about the settlement and the distribution formula, answered Class Members' questions and responded to requests for copies of documents. Where Class Members sought the advice of an attorney or wanted to discuss further the provisions of the settlement, SSI referred such requests to Class Counsel. SSI also created a database that tracks communications between claimants and others who contacted SSI or Class Counsel. *See SSI Declaration* at ¶¶ 15, 16, Ex. 6.

3. Calculation of the Initial Individual Monetary Awards.

SSI entered the pertinent information collected on Class Members' Claim Forms into a database which was transmitted to Econsult, Plaintiffs' statistical consultant. *See SSI Declaration* at ¶ 17, Ex. 6. Econsult used SSI's database along with the FDIC's databases of personnel transactions and salary information to calculate the initial allocation each Claimant was eligible to receive under the distribution formula, as described in the Notice of Monetary Distribution Formula Under Proposed Consent Decree, attached as Exhibit 6 to the Consent Decree ("Distribution Notice"); *see Econsult Declaration* at ¶¶ 9, 10, Ex. 9.

In an effort to distribute the $11.5 million allotted to the Class in an equitable manner, Plaintiffs sought to divide the monetary relief in such a way that each Claimant's award would be

related to his or her promotion history at the agency when compared to the promotion history of similarly situated white employees. Consequently, Econsult designed the distribution formula so that it tracked the employment history of Class Members at the agency within the liability period, from May 13, 1990 to March 31, 2001 and compared that history with that of white employees. Econsult created two funds, the "Backpay Fund," which provides eligible Class Members with compensation for lost earnings as a result of the FDIC's alleged discriminatory promotions and selections practices, and the "Damages Fund," which provides each eligible Class Member with monetary relief for damages related to physical and emotional harm and distress due to the FDIC's alleged discriminatory promotions practices. *See Distribution Notice,* Ex. 6 to Consent Decree; *Econsult Declaration* at ¶¶ 12-18, Ex. 9.

The Backpay Fund, which is comprised of $6,562,500, is divided into three pools, each of which corresponds to the type of promotion that a Class Member may have had delayed or denied, estimated on the basis of an analysis of the workforce data conducted by Econsult. Each pool is funded in relation to its proportion of the total lost earnings calculated by Econsult, on which Plaintiffs based their settlement demand at mediation. The three categories of lost earnings computed by Econsult for each pool are: 1) $3,060,002 for lost earnings from delays in and denials of competitive promotions; 2) $2,642,622 for lost earnings from delays in and denials of career ladder promotions; and 3) $859,876 for lost earnings from denials of certain accretion of duties promotions. Econsult calculated how much money each eligible Class Member was eligible to receive from each of these pools and determined which pool yielded the Class Member the greatest amount of money. Econsult then determined the Class Member's pro rata share of that pool and used it as a basis for determining the Class Member's pro rata share of the

entire Backpay Fund. *See Distribution Notice*, Ex. 6 to Consent Decree; *Econsult Declaration* at ¶¶ 12, 13, 17, Ex. 9.

The Damages Fund, which is comprised of $3,937,500, enables every Class Member who timely submitted a Claim Form an opportunity to recover compensatory damages for physical and emotional harm and distress and distributed those funds in accordance with the length of his or her tenure at the FDIC during the liability period. Econsult determined each eligible Class Member's pro rata share of the Damages Fund on the basis of their hire and termination dates. *See Distribution Notice*, Ex. 6 to Consent Decree; *Econsult Declaration* at ¶ 18, Ex. 9.

Econsult also set aside $1 million as a Residual Fund so that it could adjust upward, as appropriate, any individual's award in the event that an error was made in the initial calculation of that individual's award. *See Distribution Notice*, Ex. 6 to Consent Decree; *Econsult Declaration* at ¶ 11, Ex. 9. Plaintiffs established an "appeals" process by which Class Members were afforded the opportunity to bring to Econsult's attention, by writing to SSI no later than October 31, 2001, noting any errors he or she believed took place in calculating his or her monetary award under the distribution formula. *See Distribution Notice*, Ex. 6 to Consent Decree; *Econsult Declaration* at ¶ 29, Ex. 9.

Given the complexity of the distribution formula and unforeseen difficulties in calculating the monetary value of the delays in promotions, on September 5, 2001, the parties sought additional time from the Court to calculate the initial monetary allocations. The Court granted the parties' request for additional time, thereby changing the date by which SSI was required to disseminate the Distribution Notice from August 31, 2001 to October 1, 2001. *See* Order dated September 7, 2001. Class Members were also given an additional two weeks within

which to file comments or objections and notices of intent to appear at the fairness hearing, as well as to raise questions about their individual monetary awards with SSI. *See* Order dated September 7, 2001. Consequently, on September 12, 2001, SSI issued a notice to all those who filed Claim Forms and to all Class Members identified as former employees, informing them of the modification in the schedule. *See SSI Declaration* at ¶ 18, Ex. 6. The FDIC, likewise, issued a notice on September 13, 2001, via e-mail to all current employees at the time of the change in schedule. *See FDIC global e-mail Notice to All Employees of Revised Class Action Schedule of September 13, 2001* (the "September 13, 2001 FDIC global e-mail"), attached as Exhibit 10. A separate e-mail was sent to Class Members currently employed by the FDIC on September 12, 2001, regarding the same. *See September 12, 2001 FDIC Class e-mail*, Ex. 2.

In compliance with Section VI of the Consent Decree, on October 1, 2001, SSI mailed the Notice of Individual Monetary Award to those Class Members who submitted Claim Forms, informing them of their initial proposed allocation or their ineligibility to receive monetary relief because they opted out of the settlement or submitted an untimely Claim Form. *See SSI Declaration* at ¶ 20, Ex. 6. SSI also sent a notice informing non-Class Members who filed Claim Forms, such as those who were employed exclusively by the Resolution Trust Corporation ("RTC") during the liability period and student interns, of their ineligibility to receive monetary relief. *See SSI Declaration* at ¶ 22, Ex. 6.

4. Adjustments to the Initial Individual Monetary Awards.

Class Counsel invited the Class Members to check the accuracy of the personnel data provided to them and the calculations performed by Econsult by having SSI provide to those Class Members eligible to receive monetary relief personnel information upon which Econsult

relied in making its calculations. *See Personnel Data Form,* attached as Exhibit 11. This enabled Class Members to inform Econsult of any potential errors in the database or application of the formula. The parties also built into the schedule a time period for Econsult to make adjustments to its initial allocations. As anticipated, a number of Class Members timely responded to Class Counsel's invitation by writing to SSI about questions or concerns regarding their proposed awards. *See Econsult Declaration* at ¶¶ 19-29, Ex. 9.

In addition to inquiries from members of the Class, Class Representatives and Class Counsel, Econsult learned during the course of implementing the formula of errors in the database, assumptions that were incorrect and mistakes made in calculating awards. *See Econsult Declaration* at ¶¶ 19-29, Ex. 9. Given the complexity of the distribution formula and limitations of the database, Econsult realized while in performing its calculations that a number of systemic adjustments needed to be made to bring the calculations into conformity with the procedures described in the formula earlier announced to the Class and preliminarily approved by the Court. *See Distribution Notice,* Exhibit 6 to the Consent Decree; *see Econsult Declaration* at ¶¶ 19-29, Ex. 9. Given that the amount of each Class Member's award is affected by the amounts disbursed to the balance of the Class because the monetary relief provided by the settlement is a fixed amount, recalculation of each eligible Class Member's award was inevitable. *Econsult Declaration* at ¶ 21, Ex. 9. Econsult will be making adjustments in the following areas:

- Econsult used the date of the first and last personnel transactions dates as proxies for missing hire and termination dates. Econsult will correct the hire and termination dates for those persons for whom the database did not capture this information. Econsult will substitute the proxies with the actual hire and termination dates provided by Class Members who wrote to SSI with this information or by information driven from hard

copy FDIC personnel records. Where Econsult does not have an actual hire date, it will use May 13, 1990 where the first transaction date is January 13, 1991, thereby giving those Claimants the benefit of the earliest possible date in the liability period. Where Econsult does not have the termination date, it will use the date of the person's last personnel transaction as a proxy or March 31, 2001 if the last transaction occurred in 2001.

- Econsult included for consideration in the accretion of duties pool some individuals who were not eligible to receive money from this pool. The pool is restricted to those persons who were in Grade 5 as of December 31, 1996 and who did not receive a promotion in 1997. Econsult corrected the algorithm so that those who were misclassified will be excluded from this pool. This correction will result in larger allocations for individuals correctly included in the pool and no monetary award from this pool for those incorrectly included.

- Econsult included time employed at the RTC in determining whether there was delay in promotion for those employees who were employed by the FDIC and RTC during the liability period. Econsult revised the algorithm to eliminate the time spent at RTC from the promotion determination process.

- Econsult included only those Class Members who had received career ladder promotions in the group of Class Members eligible for monetary relief from the career ladder pool because the FDIC lacked adequate data to provide a list of those persons on career ladders or the career ladder positions during the liability period. However, this restriction excluded persons who were on a career ladder but never received such a promotion. Therefore, Econsult has expanded the scope of those eligible for relief from this pool by including any employee who was in a position with a grade, job series and title that matched that of an employee who received a career ladder promotion.

- Econsult miscalculated the interest for those persons receiving monetary relief from the Backpay Fund. More specifically, Econsult applied the interest rate to the salary a Class Member would have received in the absence of discrimination, instead of to the difference between that salary and his actual salary. Econsult will use the interest on the difference instead.

- Econsult calculated the lost earnings a few Class Members would have gotten in the absence of discrimination without taking into account the fact that they had been demoted. Econsult will consider demotions in calculating Class Members' Backpay awards.

- Econsult learned that there were discrepancies in the FDIC database, where for some Class Members the date they entered their initial grade precedes their hire date. Econsult will fix this aberration by substituting the enter grade date with the hire date under such

circumstances.

See Econsult Declaration at ¶¶ 14, 19-28, Ex. 9.

These changes will result in some Class Members' awards from the Backpay Fund being significantly reduced or eliminated altogether. *Id*. Other awards may increase significantly as a result of these corrections.

As the parties anticipated when the Decree was drafted, Econsult will recalculate the individual monetary awards and use money from the Residual Fund to adjust upward those corrections made as a result of individual appeals. *See Distribution Notice*, Ex. 6 to Consent Decree. Econsult will make its final calculation after the Court has had the opportunity to rule on whether any Class Members who submitted late Claim Forms may participate in the monetary portion of the settlement. Afterwards, Econsult will transmit the final monetary allocations to SSI as the basis for the final monetary distribution. *See Econsult Declaration* at ¶ 29, 30, Ex. 9.

SSI will disseminate the checks to eligible Class Members, along with a notice informing them of corrections made to the initial allocations and, subject to Court approval, clarifying language included in the Consent Decree about the nature of the harm covered.[7] *See SSI Declaration* at ¶ 24, Ex. 6.

5. Notice of the Fairness Hearing and Feedback From the Class About the Settlement.

Pursuant to the Court's Order issued September 7, 2001, SSI issued the Notice of Fairness Hearing by September 15, 2001 to those who filed Claim Forms and Class Members

[7] The parties will file a motion requesting a minor modification to the language of the Consent Decree, indicating that the compensatory damages payable under the Consent Decree are intended to redress physical as well as emotional harm.

identified as former employees. *See SSI Declaration* at ¶ 19, Ex. 6. Likewise, on September 13, 2001 the FDIC issued the Notice of Fairness Hearing via e-mail to all current employees at the time. *See FDIC global e-mail Notice of Fairness Hearing of September 13, 2001* (the "September 13, 2001 FDIC global e-mail re: Fairness Hearing"), attached as Exhibit 13. Class Counsel and the FDIC also posted the Notice of Fairness Hearing on their websites. Such notice provided critical information regarding the procedure and deadlines for filing objections, the procedure for speaking at the fairness hearing; the purpose of the fairness hearing; the effect of the settlement on Class Members' rights; and contact information for Class Counsel and SSI. *See Notice of Fairness Hearing*, attached to Consent Decree as Exhibit 5.

Only twenty-nine persons (22 objections)[8], which is less than 1% of the Class, filed objections to or comments about the substance of the Consent Decree or the monetary distribution formula with the Court. An additional 48 persons filed with the Court requests to be included in the monetary portion of the settlement, despite the untimely submission of their Claim Forms.

III. CONCLUSIONS OF LAW.

The Court makes the following conclusions of law:

A. The Legal Standard for Final Approval of a Class Action Settlement.

Rule 23(e) of the Federal Rules of Civil Procedure states that a "class action shall not be dismissed or compromised without the approval of the court." Fed. R. Civ. P. 23(e). While Rule 23(e) requires judicial approval of class action settlements, it does not provide any standards for

[8] To date, a total of 22 objections or comments were filed with the Court. One person filed an objection on behalf of himself and 7 other persons. Therefore, a total of 29 persons filed objections.

such approval. *See Bennett v. Behring Corp.*, 737 F.2d 982, 986 (11th Cir. 1984). Rather, the approval of a class action settlement is within the sound discretion of the trial court. *In re Vitamins Antitrust Litig.*, Misc. No. 99-197 (TFH), 2000 U.S. Dist. LEXIS 8931, at *17 (D.D.C. Mar. 20, 2000); *United States v. District of Columbia*, 933 F. Supp. 42, 47 (D.D.C. 1996). Prior to giving approval, the Court must provide adequate notice to the class, conduct a "fairness hearing," and then find that the "settlement is fair, adequate and reasonable and is not the product of collusion between the parties." *Pigford v. Glickman*, 185 F.R.D. 82, 98 (D.D.C. 1999); (quoting *Thomas v. Albright*, 139 F.3d 227, 231 (D.C. Cir. 1998); *Stewart v. Rubin*, 948 F. Supp. 1077, 1086 (D.D.C. 1996). In making this determination, the trial court must protect the interests of the absent Class Members. *Pigford*, 185 F.R.D. at 98.

In exercising its discretion, the Court "should always review the proposed settlement in light of the strong judicial policy that favors settlements." *Behrens v. Wometco Enterprises, Inc.*, 118 F.R.D. 534, 538 (S.D. Fla. 1988); *Stewart*, 948 F. Supp. at 1086; *Cotton v. Hinton*, 559 F.2d 1326, 1331 (5th Cir. 1977) ("Litigants should be encouraged to determine their respective rights between themselves."). This is especially true in the case of class actions given their inherent uncertainty, difficulties in proof and length. *Cotton*, 559 F.2d at 1331; *Behrens*, 118 F.R.D. at 538. Furthermore, the settlement of complex cases conserves scarce judicial resources and resolves disputes more quickly. *Cotton*, 559 F.2d at 1331; *see also In re United States Oil and Gas Litigation*, 967 F.2d 489, 493 (11th Cir. 1992) ("Complex litigation . . . can occupy a court's docket for years on end, depleting the resources of the parties and the taxpayers while rendering meaningful relief increasingly elusive.").

In assessing the fairness and adequacy of a proposed class settlement, "there is a strong

initial presumption that the compromise is fair and reasonable," especially for cases brought under Title VII of the Civil Rights Act of 1964. *Stewart*, 948 F. Supp. at 1086; *see Luevano v. Campbell*, 93 F.R.D. 68, 85 (D.D.C. 1981) ("decisions emphasizing the preferred role of settlements under Title VII are legion"). As the Supreme Court has recognized, Congress enacted Title VII with a "strong preference" for "encouraging voluntary settlement of employment discrimination claims" to ensure compliance. *See Stewart*, 948 F. Supp. at 1086; *see also Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 44 (1974). Therefore, while the trial court's review should not be perfunctory, the Court should assess the validity of a Title VII class action settlement with a presumption in favor of its validity so long as the settlement is not "unreasonable, unlawful or against public policy." *Stewart*, 948 F. Supp. at 1086-87.

Furthermore, while the trial court should carefully review the settlement, the Court may not try the case on the merits. *In re Smith*, 926 F.2d 1027, 1028 (11th Cir. 1991); *Cotton*, 559 F.2d at 1326. In the absence of fraud, the Court is encouraged to rely on the judgment of experienced counsel and "should be hesitant to substitute [its] own judgment for that of counsel." *In re Smith*, 926 F.2d at 1028; *Behrens*, 118 F.R.D. at 539. The Court is only authorized to grant or deny final approval and may not alter the settlement as it sees fit. *Brooks v. Georgia State Board of Elections*, 59 F.3d 1114, 1119 (11th Cir. 1995); *Evans v. Jeff D.*, 475 U.S. 717, 726-27 (1986). In sum, the "test is whether the settlement is adequate and reasonable and not whether a better settlement is adequate and reasonable and not whether a better settlement is conceivable." *In re Vitamins*, 2000 U.S. Dist. LEXIS 8931, at *19.

There is "no single, obligatory test" in this Circuit for determining whether a class settlement is fair, adequate and reasonable. *In re Vitamins*, 2000 U.S. Dist. LEXIS 8931, at *18;

Pigford, 185 F.R.D. at 98; *Osher v. SCA Realty I, Inc.*, 945 F. Supp. 298, 303-304 (D.D.C. 1996). Rather, the trial court "must consider the facts and circumstances of the case, ascertain what factors are most relevant in the circumstances and exercise its discretion in deciding whether approval of the proposed settlement is fair." *Pigford*, 185 F.R.D. at 98; *In re Vitamins*, 2000 U.S. Dist. LEXIS 8931, at *18 (same).

The courts in this Circuit have examined a variety of factors in determining whether to approve of a class action settlement, including:

1) whether the settlement is the result of arm's-length bargaining;
2) the terms of the settlement in relation to the strength of plaintiffs' case;
3) the status of the litigation at the time of settlement;
4) the reaction of the class; and
5) the opinion of experienced counsel.

In re Vitamins, 2000 U.S. Dist. LEXIS 8931, at *18; *see also Stewart*, 948 F. Supp. at 1087; *Thomas*, 139 F.3d at 230-33; *Pigford*, 185 F.R.D. at 98-101; *In re Nat'l. Student Mktg. Litig.*, 68 F.R.D. 151, 155 (D.D.C. 1974); *Osher*, 945 F. Supp. at 304. An analysis of these factors weighs in favor of approval of the settlement.

B. The Settlement Readily Meets the Criteria for Final Approval Commonly Used in this Circuit.

1. The Settlement is Fair, Adequate and Reasonable.

Careful examination of the Proposed Consent Decree and the circumstances surrounding its negotiation shows that it is fair, adequate and reasonable.

a. There Are Significant Risks Associated With Proceeding to Trial.

While the Court's primary task in assessing the fairness and adequacy of the settlement is to evaluate the provisions of the settlement in comparison to the strength of Plaintiffs' case, the

Court "should not reject a settlement merely because individual Class Members complain that they would have received more had they prevailed after a trial." *Thomas*, 139 F.3d at 231; *see Stewart*, 948 F. Supp. at 1087.

Class Counsel have investigated the Class claims and the FDIC's potential defenses and have concluded that the proposed Settlement is an excellent result, particularly given the risk inherent in this litigation. While Plaintiffs might have prevailed in this case had they gone to trial, that outcome was by no means guaranteed.[9] A loss would have left the Class with no relief. This resolution avoids that risk and the substantial delay in receiving any relief were the case to be litigated rather than settled.

While the Plaintiffs believe strongly in the merits of their case, the risks associated with further litigation counsel in favor of a settlement. After reviewing hundreds of pages of documents reflecting FDIC personnel policies and procedures and analyzing the FDIC workforce database, with the assistance of a nationally-renowned labor economist, Plaintiffs found evidence of disparities in the time to promotion that were statistically significant and similar types of evidence, albeit less consistently, of disparities in granting promotions between African-American and white candidates. While the FDIC's expert recognized the rationale for Plaintiffs' analysis of the time to promotion,[10] he declined firmly to agree with the conclusion that there were statistically significantly fewer promotions made to African-Americans than to white

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[9] *See e.g.*, *Ingram v. the Coca-Cola Company*, 200 F.R.D. 685, 689 (N.D. Ga. 2001) (noting success rate of defendants in employment discrimination cases on appeal).

[10] Plaintiffs' expert found that African-Americans encountered greater delays in becoming promoted than those faced by white employees.

employees.[11] The division between the experts could have been resolved in favor of Plaintiffs, or for the FDIC on this issue. Despite the difference in opinion between the experts, the settlement fully accounts for the earnings lost because of delays in promotion and to a lesser extent the lost earnings attributable to differences in the receipt of promotions altogether.

Had this case gone forward, Plaintiffs would also have faced the hurdle of class certification. The courts are divided over whether the pursuit of compensatory damages, sought in this action, requires such individualized inquiries so as to preclude certification under Rule 23(b)(2). *See, e.g., Allison v. Citgo, 151 F.3d 402 (5th Cir. 1998)*; *compare Robinson v. Metro North*, 267 F.3d 147 (2d Cir. 2001). The Settlement allows the Class to recover not only back pay, broad injunctive relief, but also compensatory damages for emotional physical harm.

Even if Plaintiffs ultimately prevailed on the merits, after securing class certification, they would inevitably have had to suffer substantial delay before receiving any measure of individual relief or changes to FDIC procedures. The case has already been pending for nearly 10 years. Other EEO class actions against federal agencies that have progressed to a later stage of litigation before being settled have lasted between 20 and 30 years. *See, e.g., Hartman v. Powell,* Civ. No. 77-2019 (D.D.C. 2000)*; McKenzie, et al. v. Kennickel*, 875 F.2d 330 (D.C. Cir. 1989). Were the resolution of this action to proceed further in litigation, members of the Class might have to wait years before they received any relief. By avoiding such delays, this settlement contributes significantly to the interests of the Class.

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[11] There was some agreement between the experts about the existence of shortfalls of promotions for those African-American employees who were Grade 5 as of December 31, 1996 who sought promotions because of an accretion of duties and did not receive a promotion in 1997. However, the parties vehemently disagreed on the meaning of these results.

b. The Stage of the Proceedings Provides the Parties With Ample Basis to Evaluate the Settlement.

Although this action is less than a year old, having been filed on December 22, 2000, the Settlement is the product of seven years of pre-trial activity, including significant briefing, hearings, claims investigations, Class Member interviews, personnel document reviews, and conducting other pre-trial matters before OFO and the EEO Administrative Judge, and eight months of recent mediation, all of which have provided the parties with the opportunity to familiarize themselves with the legal and factual issues presented in this case.[12] During the mediation process, the Plaintiffs also availed themselves of extensive factual discovery, by reviewing FDIC documents describing employment policies and procedures and by hiring experts to evaluate FDIC workforce data, the type of which would have been demanded had litigation ensued.

c. There Has Been Nominal Opposition to the Settlement.

In response to the extensive notice issued, relatively few objections to the Settlement have been received to date. Pursuant to the Court's Order dated May 16, 2001 and the terms of the Settlement Agreement, SSI disseminated notice to the Class. *See SSI Declaration* at ¶¶ 6, 18-24, Ex. 6. The parties provided the Court with a detailed description of the notice plan, see Consent Decree at Section VI, which the Court concluded met the criteria of Rule 23(e). The parties have complied with the notice plan. *See SSI Declaration* at ¶ 9, Ex. 6.

There are 3,144 members of the class. *See Econsult Declaration* at ¶ 7, Ex. 9. To date,

[12] On March 6, 2001, the parties voluntarily sought dismissal of the administrative class complaint pending before the EEOC. Pursuant to this request, on March 8, 2001, the administrative class complaint was dismissed.

the parties have received 22 objections or comments (or correspondence to SSI the parties have interpreted as such) to the Proposed Consent Decree, which constitute less than 1% of the Class. In contrast, SSI has received 2,103 Claim Forms to date and hundreds of telephone calls inquiring about the Settlement. *See SSI Declaration* at ¶¶ 12, 15, Ex. 6. Objections from such a small number of Class Members weighs in favor of the conclusion that the Settlement is fair.[13]

In addition, the objections received reveal no significant or consistent criticism that warrants the Court's disapproval. To date, 77 persons have filed submissions with the Court that comply with the procedure set forth in the Consent Decree. Of those, the majority (62% or 48 out of 77 persons) are simply requesting that the Court include them in the monetary relief despite their untimely Claim Forms.[14] Such requests are, if anything, an endorsement of the beneficial nature of the Settlement.

None of the objections or comments filed with the Court alters its assessment that the Settlement is fair to the Class as a whole.

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[13] *See In re Prudential Ins. Co. Am. Sales Practice Litig.*, 148 F.3d 283, 318 (3d Cir. 1998), *cert. denied*, 525 U.S. 1114 (1999) (district court's approval of settlement was not abuse of discretion where court concluded 300 objectors out of class of 19,000 as "truly insignificant" and "limited number of objections filed . . . weighed in favor of approving the settlement.").

In fact, settlements in which class representatives object have also been approved. *See Purcell v. Keane*, 54 F.R.D. 455, 457 (E.D. Pa. 1972) (settlement approved despite objections of nine persons, including four out of six class representatives); *Thomas*, 139 F.3d at 232 (concluding that class action settlement was fair despite large number of objectors, stating "a settlement can be fair even though a significant portion of the class and some of the named plaintiffs object to it").

[14] The Consent Decree does not provide for any exceptions to the requirement that Class Members submit their Claim Forms to SSI by the July 16, 2001 deadline. SSI established a careful procedure to determine whether Claim Forms were timely. *See SSI Declaration* at ¶ 10, Ex. 6. Therefore, the Plaintiffs do not accept any Claim Forms that were not timely submitted, as set forth in the Consent Decree. The Court, of course, has discretion to determine otherwise.

i. Many Objectors Are Non-Class Members Who Wish The Settlement Included Them.

Almost half of the persons who filed objections with the Court (13 out of 29 persons or 45%)[15] do not object to the terms of the Settlement at all. Instead they express disappointment that certain persons or groups of persons were not Class Members and therefore could not participate in the relief provided by the Consent Decree. These objections were made on the behalf of African-Americans employed at the RTC, a white male employee over forty years of age at the FDIC and gay and lesbian FDIC employees.

First, any current FDIC employee will enjoy the benefits of the equitable relief. The Consent Decree explicitly states and is designed to ensure that any new personnel systems will be fair to all employees. The Decree expressly does not favor one group of employees over another in the new personnel policies and practices which it embraces. In particular, Section I.2. of the Consent Decree states:

> No provision of this Consent Decree is intended as, or is properly interpreted as, constituting a quota or timetable. Nothing contained in this Decree shall obligate, require authorize or permit the FDIC to grant to any person a preference in promotion, selection, or any other Employment Practice on the basis of race. Similarly, nothing contained in this Decree shall obligate the FDIC to create new positions, to fill any particular position, or to promote, select, or non-competitively assign any particular person or class of persons.

The injunctive relief provisions are race neutral and will benefit all FDIC employees. For example, the development of the cluster job analyses will ensure that promotions and other selections for positions are based on legitimate, merit-based criteria and will provide a solid foundation for the creation of legitimate, merit-based vacancy announcements, position

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[15] This comprises over a quarter (6 out of 22 objections or 27%) of the total objections received.

descriptions and crediting plans for all employees. *See* Section III.B.1(a) of the Consent Decree; *see also Stewart*, 948 F. Supp. at 1095, 1097-98 & n.10, 1100 (finding that the new personnel systems, including job analyses, would benefit all employees, not just African-Americans where white non-Class Members objected to employment class action settlement). Indeed, this Court has already rejected the charge that the Decree favors African-American employees over others at the FDIC. *See Transcript of Status Hearing Before The Honorable Ellen Segal Huvelle, United States District Court* (May 16, 2001) at 42 (lines 2-25) 43, 44, 45 (lines 1-25) and 46 (lines 1-13, Ex. 4. Nothing in the objections warrants a change to that ruling.

Second, the fact that members of another protected class would like relief similar to that provided in this Settlement is not a legitimate grounds upon which to question this Settlement. The Plaintiffs are not obligated to allege discrimination on behalf of every protected class or on the basis of every type of discrimination.[16]

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[16] In his informal EEO complaint, *see* Exhibit 12, filed June 12, 1992, Mr. Conanan initially challenged the RTC's hiring and promotion practices as discriminatory against African-Americans in addition to targeting promotion and other practices at the FDIC. Mr. Conanan himself had applied for and been rejected for two positions at the RTC as well as for FDIC promotions. However, Mr. Conanan's ongoing efforts to find an adequate representative for African-Americans challenging the RTC's practices had been unsuccessful. Furthermore, no RTC employee came forward to complain to Class Counsel about race discrimination in promotions at the RTC. The formal complaint therefore included only former and current African-American FDIC employees in the putative class.

A separate representative from the RTC would have been necessary because the RTC was a separate entity from the FDIC. The RTC was created by Congress in 1989 (after the FDIC was created) to resolve the savings and loan crisis, 12 U.S.C. § 1441a (b)(1)(A), and it ceased to exist on December 31, 1995, 12 U.S.C. § 1441a (m)(1). Furthermore, the two agencies had separately functioning EEO offices and complaint procedures. In addition, Mr. Conanan would not have been able to exhaust the administrative remedies for pursuing a promotion claim against the RTC since, as an FDIC employee, he had been denied a position, but not a promotion, at the RTC.

ii. Objections on Grounds that the Consent Decree Should Provide for More Money Do Not Alter its Fairness to the Class

Another 25% (5 out of 22) of the objections or comments filed complained that individual Class Members did not receive more money or that the Consent Decree did not provide them with the compensation they believe they would have received had they successfully pursued their own case.[17] However, a "claim that individual dissenters are entitled to more money is not, by itself, sufficient to reject the overall fairness of the settlement." *Thomas*, 139 F.3d at 232. The trial court is obligated to evaluate the fairness of the settlement to the class as a whole and "not reject a settlement merely because individual class members complain that they would have received more had they prevailed after a trial." *See id.*, at 233 (holding that trial court did not abuse its discretion in approving consent decree over objections that some individuals felt they were entitled to receive more money); *Stewart*, 948 F. Supp. at 1087 ("A court should not withhold approval simply because the benefits accrued from a settlement agreement are not what a successful plaintiff might receive in a fully-litigated case."). In addition, the adequacy of the monetary relief must be assessed within the context of the other provisions of the Consent Decree. *United States v. Trucking Employers, Inc.*, 561 F.2d 313, 317 (D.C. Cir. 1977).

[17] Some objectors sought additional information than that provided by Econsult in the Personnel Data Form. However, at the request of Class Members before the deadline for filing Claim Forms, Class Counsel sought to provide Class Members detailed pertinent personnel information upon which Econsult relied. For example, the Personnel Data Form included hire and termination dates, grades at the end of the year in the liability period, and their percentage of relief from the Backpay and Damages Funds.

To evaluate the Settlement primarily upon the monetary relief available to each individual Class Member is shortsighted and fails to take into account the overwhelming injunctive relief and other benefits conferred on the Class. The Class Representatives have done exactly what they set out to do – put into place policies and procedures that will ensure that promotions and other selections at the FDIC will be based more on merit and not racial discrimination. The FDIC is required under the Consent Decree to make such changes and will be monitored by Plaintiffs, with continuing jurisdiction by the Court, for a three year period.

Moreover, the Consent Decree enables Plaintiffs to avoid the risk that Class Members may not recover anything if this case were litigated to a conclusion. *See Pigford*, 185 F.R.D. at 103-104 (balancing certainty of some monetary relief relatively soon under class settlement with risk of recovering nothing after protracted litigation). While some individuals may conclude that they could recover greater earnings and compensatory damages if they litigated their own cases, they also avoid the risk of loss and the delay occasioned by further proceedings. Each Class Member was afforded the opportunity to opt out of the Settlement. This is sufficient protection of the interest of Class Members to preserve their own claims.

It is of no consequence that Class Members were compelled to decide whether they wanted to opt out or object to the Consent Decree prior to learning of their initial individual monetary awards under the Consent Decree. It is not uncommon for the trial court to approve class action settlements where individual class members had little or no notice of the amount their personal monetary award. *See Grant v. Riley*, Civ. Action No. 1:00CV01595 (D.D.C. Dec. 8, 2000); *see also McLaurin v. Nat'l. Passenger R.R. Corp. (Amtrak)*, Civ. Action No. 98CV2019 (D.D.C. Oct. 25, 1999) (the distribution formula was devised after the court granted

final approval of the settlement); *Thornton v. Nat'l. Passenger R.R. Corp. (Amtrak)*, Civ. Action No. 98CV0890 (D.D.C. June 2000) (same); *Bowling v. Pfizer, Inc.*, 143 F.R.D. 141, 165 (S.D. Oh. 1992) (same) (citing *In re Drexel Burnham Lambert Group, Inc*., 130 B.R. 910, 925 (S.D. N.Y. 1991), *aff'd*, 960 F.2d 285 (2d Cir. 1992)). Here, Class Counsel has provided initial allocations to eligible Class Members, which affords more notice than is ordinarily required in this jurisdiction. The process provided adequately protected the Due Process rights of absent Class Members.

iii. Objectors' Concerns About the Flaws in the Implementation of the Distribution Formula Are Already Being Addressed.

Almost half (45% or 10 out of 22) of the objections or comments filed, criticized the design of the distribution formula or its application. Given Plaintiffs' desire to disseminate the $11.5 million to the Class in such a way that it was related to the actual work history of Class Members, the distribution formula created was necessarily complex. *See Econsult Declaration* at ¶¶ 9, 10, Ex. 9. As described earlier, Econsult is already making adjustments to the initial allocations, many as a result of objectors' comments. *See Econsult Declaration* at ¶¶ 19-29, Ex. 9. In anticipation of the need to make corrections in the application of the formula, Class Counsel provided in the process the opportunity for Class Members to bring mistakes to the attention of Econsult and set aside $1 million in a Residual Fund so that such adjustments could be made. Numerous Class Members have availed themselves of this process, which has only enhanced and strengthened the process even further.

d. Experienced Counsel from the Plaintiffs' and Defendant's Sides Conclude That the Settlement is Fair, Adequate and Reasonable.

In determining whether to grant approval of a settlement, the trial court "should defer to the judgment of experienced counsel who have competently evaluated the strength of the proof." *Stewart*, 948 F. Supp. at 1087. A settlement is by nature a compromise reached once the risks, expense and delay of additional litigation have been assessed. *Id.* After years of litigation and mediation, Counsel for the Class and the FDIC have concluded on the basis of a well informed and clear understanding of the value of the claims being compromised and the benefits being obtained that this Settlement should be approved. The Court is fully satisfied that counsel for the Class and the FDIC brought to bear substantial and relevant experience with similar cases to inform the negotiations here.

The attorneys representing the parties to the Consent Decree are seasoned trial attorneys, with extensive experience in this type of litigation. In particular, the attorneys representing Plaintiffs include counsel with substantial experience in the litigation, certification, trial and settlement of numerous civil rights class actions. Class Counsel have extensive experience in the area of employment discrimination class actions and have served as class counsel in several dozen private and federal class actions and civil rights cases.

2. There Was No Fraud or Collusion Between the Parties or Their Attorneys.

It is clear that the Consent Decree is the result of non-collusive, arms-length negotiations between counsel. The mediation, with the assistance of Ms. Singer, has been lengthy and intense, consisting of multiple meetings and over sixty hours of negotiation. After almost ten

years from the inception of this litigation, involving some of the initial Class Agents and Class Counsel, there is no room for doubt that this Settlement was accomplished at arms-length by vigorous advocates for the parties. Once such negotiations began, the parties exchanged multiple proposals and counter-proposals before arriving at the Proposed Consent Decree.

Moreover, the Consent Decree provides for the payment to Class Counsel of reasonable attorneys' fees and costs. The parties have agreed to the payment to Class Counsel the amount of two million dollars ($2,000,000), which is 14% of the total monetary recovery. Class Counsel's fee award is well within the range that courts have established as reasonable. *See Petruzzi's, Inc. v. Darling-Delaware Co.*, 983 F. Supp. 595, 603 (M.D. Pa. 1996); *see also In re General Motors Corp. Pick-up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 822 (3d Cir. 1995) (fee awards range from 19 to 45%).

Additionally, the awards to the three Class Representatives and three other current and former FDIC employees who actively participated in the EEO administrative process or the first mediation are regularly approved by courts in class action cases. *See In re: Dun & Bradstreet*, 130 F.R.D. 366, 373-74 (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 sum, there is absolutely no indicia of fraud or collusion in the parties' agreement to the Settlement or that the negotiations were conducted in a manner other than in good faith and at arms-length.[18]

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[18] At the time it gave preliminary approval to the Settlement, the Court found no evidence of collusion or "basis to question the fairness or the dealings between the parties." *See Transcript of Status Hearing Before the Honorable Ellen Segal Huvelle*, United States District

For all the foregoing reasons, the Court concludes that the Settlement readily meets the judicial standard of approval.

C. The Consent Decree Meets the Notice Requirement of Section 108 of the Civil Rights Act of 1991.

The Proposed Consent Decree meets the notice requirement of Section 108 of the Civil Rights Act of 1991, *see* 42 U.S.C. § 2000e-2(n), which bars future collateral challenges to the procedures and practices set forth in the Settlement. *See Stewart*, 948 F. Supp. at 1093 (Table); *see also Querim v. EEOC*, 111 F. Supp.2d 259, 267-68 (S.D.N.Y. 2000) (collateral attacks barred if Section 108 followed).

To invoke Section 108, the Court must find that the defendant has given:

> (I) actual notice of the proposed judgment or order sufficient to apprise such person that such judgment or order might adversely effect the interests and legal rights of such person and that an opportunity was available to present objections to such judgment or order by a future date certain; and
>
> (II) a reasonable opportunity to present objections to such judgment or order.

42 U.S.C. § 2000e-2(n).

The notice plan approved by the Court reasonably conveyed to Class Members and non-Class Members alike the information that was required to be communicated and afforded a reasonable time for those interested to comment on the proposed settlement. The notice plan was further supplemented by the use of Class Counsel and FDIC websites where relevant settlement documents were posted and the use of a toll-free telephone number to field questions about the settlement. Further, the Court also held a preliminary approval hearing on May 16, 2001, where

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Court (May 16, 2001), at 107 (lines 2-13), Ex. 4.

interested parties (both class and non-class members alike) attended and were heard by the Court. The notice plan was more than sufficient to apprise interested parties of their rights and opportunities to be heard. That conclusion is demonstrated by the fact that non-Class Members sought intervention to challenge the settlement and filed timely objections. Accordingly, the Court finds that the parties to this settlement complied with the procedures of Section 108. *See Stewart*, 948 F. Supp. at 1093.

IV. CLASS CERTIFICATION IS WARRANTED.

Although the Court conditionally certified this case as a class action pursuant to Rule 23 (b)(2) in its Order issued on April 6, 2001, it must ultimately determine whether the requirements of Rule 23 have been satisfied in order to insure that the due process rights of absent Class Members are protected in this settlement. *See Amchem Prods. Inc. v. Windsor*, 521 U.S. 591 (1997). Accordingly, the Court makes the following findings of fact and conclusion of law regarding the susceptibility of this action to certification under Rule 23, Fed. R. Civ. P.

Plaintiffs have readily demonstrated satisfaction of the requirements of Rule 23(a)(1), that members of the prospective class are "so numerous that joinder of all members is impracticable." Fed. R. Civ. P. 23(a)(1). The parties have stipulated that the size of the Class is approximately three thousand current and former African-American employees of the FDIC. *See Plaintiffs' Memorandum of Points and Authorities in Support of their Motion for Class Certification*, at 2n.1; *see also Econsult Declaration* at ¶ 7, Ex. 9 (3,144 Class Members). The Court has also been informed that 2,103 persons returned Claim Forms indicating an interest in participating in the monetary relief provided through this settlement. Therefore, the Court concludes that the numerosity requirement of Rule 23(a)(1) has been satisfied.

The Court also finds that Plaintiffs have satisfied the requirements of Rule 23(a)(2), which requires that there be questions of law or fact common to all members of the class. The key inquiry is whether members of the proposed class have been subjected to the same or similar discriminatory employment practices. *Gen. Telephone Co. of the Southwest v. Falcon*, 457 U.S. 147, 159 n. 15 (1982). Here, members of the Class have alleged that they have been subjected to the same excessively-subjective promotion policies and practices which have adversely affected their careers at the FDIC. *See* Complaint, ¶16. Accordingly, the resolution of Plaintiffs' claims will revolve around one or more common questions of law or fact which affect all members of the Plaintiff Class. *See Littlewolf v. Hodel* 681 F. Supp 929, 935 (D.D.C. 1988); *see also Hartman v. Duffy*, 158 F.R.D. 525, 537 (D.D.C. 1994). Because the members of the Class challenge the same discrete features of the non-competitive and competitive promotion policies and practices at the FDIC, their claims are bound together by a "common factual and legal thread" sufficient to satisfy the commonality requirement of Rule 23(a)(2). *See Falcon*, 457 US at 147 n. 15; *Stewart*, 948 F. Supp. at 1088.

Pursuant to Rule 23(a)(3), the claims of the named plaintiffs must be typical of the claims being advanced by the class. Based on the Complaint, the Court finds that the claims of the Named Plaintiffs are typical of the complaints advanced by the Class. Each Named Plaintiff is a long-standing and current employee of the FDIC. *See Complaint*, ¶¶ 20, 26 & 31. Each alleges that he or she has been denied promotions for which she or he was qualified on the basis of race. *See id.* ¶¶ 22-25, 27-30 & 32. The Plaintiff Class has also alleged that its members have been denied promotional opportunities because of their race. *See id.* ¶ 16. Accordingly, the claims of the Named Plaintiffs are typical of those advanced by the Plaintiff Class, in satisfaction of Rule

23(a)(3).

The last requirement of Rule 23(a) is that the Named Plaintiffs and the counsel for the Class fairly and adequately protect the interests of the Class. *See* Fed. R. Civ. P. 23(a)(4). This requirement is satisfied by demonstrating first, that the Class Representatives' interests are consistent with, and not antagonistic to, those of the absent class members and second, that the representatives of the Class are able to prosecute this action and advance the interest of the Class effectively. *See Falcon*, 457 U.S. at 157 n. 13; *Gonzalez v. Brady*, 136 F.R.D. 329, 331 (D.D.C. 1991). Since each Named Plaintiff has evidenced the same interest in eliminating racially discriminatory aspects of the FDIC promotion system, their interests are consistent with those of the balance of the Class. *See Stewart*, 948 F. Supp. at 1088. Moreover, the Named Plaintiffs and the absent Class Members claim to have suffered the same type of injury as a result of these challenged promotion policies and practices. *See Gonzalez*, 136 F.R.D. at 331. In addition, the Court finds, based on the record and its opportunity to observe the Named Plaintiffs and counsel for the Class, that they have effectively and vigorously advanced the interests of the Plaintiff Class. The Named Plaintiffs have lengthy records of distinguished service at the FDIC and have been actively involved in the mediation and other activities associated with this litigation. In addition, counsel for the Plaintiff Class, Cohen, Milstein, Hausfeld & Toll, P.L.L.C. and the Washington Lawyers' Committee for Civil Rights and Urban Affairs, have successfully been representing the interests of the Plaintiff Class. Accordingly, the requirements of Rule 23(a)(4) have been satisfied.

The Plaintiffs must also satisfy one or more of the requirements under Rule 23(b). At the request of the Plaintiffs, with the concurrence of the FDIC, the Court earlier granted preliminary

certification of the Class under Rule 23(b)(2), and directed the issuance of notice and provided the opportunity for absent Class Members to opt out of the Class. The Court is satisfied that this case has been properly certified under Rule 23(b)(2) accompanied by notice and the right to opt out. Accordingly, it reaffirms its earlier decision to preliminarily certify this action on that ground.

Certification under Rule 23(b)(2) is proper when "the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole." Fed. R. Civ. P. 23(b)(2). Historically, because discrimination is often practiced against a group and because the relief available under Title VII are equitable in nature, civil rights cases were regarded as the quintessential type of case appropriate for certification under Rule 23(b)(2). *See Amchem Prods. Inc.*, 521 U.S. at 615; *Stewart*, 948 F. Supp. at 1089. Because Plaintiffs claim that the alleged discriminatory conduct was directed against the entire Class and the relief that they seek is largely equitable in nature, the requirements of Rule 23(b)(2) seem to be easily satisfied.

Since Plaintiffs have also sought compensatory damages, further attention must be given to the question of whether this action is appropriately certified under Rule 23 (b)(2). Some courts have expressed hesitated to certify a class pursuant to Rule 23 (b)(2) where the class seeks compensatory damages as well as equitable monetary and injunctive relief. *See, e.g., Allison,* 151 F.3d at 416-17. Other courts have rejected those concerns, as long as there is evidence that the principal relief which the class seeks is equitable in nature. *See, e.g., Robinson,* 267 F.3d at 164. Although the D.C. Circuit has not had occasion to address this issue squarely, its decisions

support the approach taken here, in which the Class was certified pursuant to Rule 23(b)(2) and notice and a right to opt out was provided to absent Class Members.

In *Eubanks v. Billington*, 110 F.3d 87 (D.C. Cir. 1997), the Court of Appeals allowed for the certification of class actions pursuant to Rule 23(b)(2) with the provision for notice and opt out rights and described them as a "hybrid" approach to certification. *Id.* at 96. The Court endorsed the provision for notice and the right to opt out when it would "facilitate the fair and efficient conduct of the action." *Id.; see Lemon v. Nat'l. Union of Operator Engineers, Local No. 139*, 216 F.3d 577 (7th Cir. 2000); *see also Jefferson v. Ingersoll*, 195 F.3d 894 (7th Cir. 1999).

Even a cursory review of the Proposed Consent Decree confirms that equitable relief predominates in the pending case. The Proposed Decree contains over a dozen pages describing in detail the proposed programmatic changes to the FDIC's personnel policies and practices. Plainly, these reforms are a vital and very substantial part of the settlement and occupy a role sufficient to assure the Court that monetary relief does not predominate. Accordingly, the presence of compensatory damages among the relief sought by Plaintiffs does not undermine the soundness of certifying this action pursuant to Rule 23 (b)(2).

Nonetheless, the possibility that the nature and severity of emotional and physical harm to which the compensatory damage fund responds may vary among Class Members strongly counsels in favor of permitting the issuance of notice and allowing the right to opt out here. *See Eubanks v. Billington*, 110 F. 3d 87, 95-96 (D.C. Cir. 1997) (even wide variations in back pay amounts among Class Members may justify notice and opt out rights); *see also Lemon*, 216 F.3d at 582. Unlike in *Eubanks*, the parties in this action negotiated a provision in the Proposed

Consent Decree which expressly endorses the issuance of notice and the right to opt out to absent Class Members. *See Sec. II.D. 1(b) of the Consent Decree*. The parties' greater familiarity with the types of harm which the compensatory damages fund is intended to address and their support for this hybrid approach provides the Court with further reassurance that this approach is warranted here. Accordingly, the Court concludes that it will certify this action pursuant to Rule 23(b)(2) after having afforded absent Class Members notice of the terms of the settlement and the right to opt out.[19]

V. CONCLUSION.

For the foregoing reasons, Plaintiffs respectfully request that the Court grant Plaintiffs' Motion for Final Approval of Consent Decree, certify the Class, enter the proposed Final Approval Order and adopt the proposed Findings of Fact and Conclusions of Law set forth in Plaintiffs' Memorandum in Support and Motion for Final Approval of Consent Decree and Class Certification.

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Respectfully submitted by,

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[19] Alternatively, the Court may certify this class as a "hybrid" class action pursuant to Rules 23(b)(2) and 23(b)(3). *See Eubanks*, 110 F.3d at 94-95.

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