No. 07-10235-BB

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee

JOHN F. KNIGHT, JR. and ALEASE S. SIMS, *et al.*,
Intervenors-Plaintiffs-Appellees

GEORGE MUNCHUS and WILLIE STRAIN,
Appellants

v.

STATE OF ALABAMA, *et al.*,
Defendants-Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA

BRIEF FOR THE UNITED STATES AS APPELLEE

WAN J. KIM
Assistant Attorney General

MARK L. GROSS
ANGELA M. MILLER
Attorneys
U.S. Dep't of Justice, RFK-3720
Ben Franklin Station
P.O. Box 14403
Washington, D.C. 20044-4403
(202) 514-4541

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Appellee, the United States of America, through undersigned counsel, certifies pursuant to Fed. R. App. P. 26.1 and 11th Cir. R. 26.1-1 that, in addition to those persons identified by the appellants, the following persons, firms, and entities may have an interest in the outcome of this case:

1. W. Stanley Gregory
2. Mark L. Gross
3. Wan J. Kim
4. Troy King
5. Angela M. Miller
6. John J. Park, Jr.

/s/ Angela M. Miller
ANGELA M. MILLER
Attorney

STATEMENT REGARDING ORAL ARGUMENT

The United States believes that the facts and legal arguments are adequately presented in the briefs and record and that oral argument is unnecessary to resolve the issues in this case.

TABLE OF CONTENTS

PAGE

TABLE OF CONTENTS (continued): **PAGE**

TABLE OF CITATIONS

CASES: **PAGE**

CASES (continued): **PAGE**

STATUTES:

RULES:

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STATEMENT OF JURISDICTION

This is an appeal from a final decision of a United States district court. Appellants, two unnamed members of the plaintiff class, appeal the district court's Order and Final Judgment of December 12, 2006, which approved the settlement agreements between the plaintiff class and the several defendants and ended over 25 years of prior litigation in this case. This Court has jurisdiction pursuant to 28

U.S.C. 1291, which grants courts of appeals jurisdiction of appeals "from all final decisions of the district courts of the United States." 28 U.S.C. 1291.

STATEMENT OF ISSUES

Whether the district court clearly abused its discretion in approving the settlement agreements between the plaintiff class and the several defendants.

STATEMENT OF THE CASE

This case began in 1983 when the United States filed suit in the United States District Court for the Northern District of Alabama against the State of Alabama, its Governor, the Superintendent of Education, the State Board of Education, the Alabama Commission on Higher Education, the Alabama Public School and College Authority, and ten public colleges and universities, (collectively in this section, "the State") alleging that the State operated a racially dual system of higher education and that vestiges of the dual system remain, in violation of Title VI and the Fourteenth Amendment. See *Knight* v. *Alabama*, 787 F. Supp. 1030, 1048-1049 (N.D. Ala. 1991). The Knight plaintiffs, representing all black citizens of Alabama and all past, present and future students, faculty, staff and administrators of Alabama State University (ASU) and Alabama A&M University (AAMU), intervened, and defendants ASU and AAMU were realigned as plaintiffs. *Id.* at 1049. There was an extensive trial, see *United States* v.

Alabama, 628 F. Supp. 1137 (N.D. Ala. 1985), an appeal, see *United States* v. *Alabama*, 828 F.2d 1532 (11th Cir. 1987), a second trial following remand from this Court, see *Knight* v. *Alabama*, 787 F. Supp. 1030 (N.D. Ala. 1991), a comprehensive remedial decree, *ibid*, a second appeal to this Court, *Knight* v. *Alabama*, 14 F.3d 1534 (11th Cir. 1994), a second comprehensive remedial decree, *Knight* v. *Alabama*, 900 F. Supp. 272 (N.D. Ala. 1995), and ten additional years of district court and appellate litigation to implement the measures set forth in the two remedial decrees.

At this time, the class plaintiffs and defendants have agreed to settle all remaining issues in this case.[1] The district court preliminarily approved the settlement agreements on October 27, 2006. Doc 3478.[2]

Defendants AAMU and the State, and five unnamed members of the plaintiff class, filed objections to the settlement agreements. After those objections were

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[1] The Knight-Sims plaintiffs reached settlement agreements with defendants University of West Alabama (Doc 3427), the State Board of Education (Doc 3452), Troy University (Doc 3460), University of South Alabama (Doc 3461), Jacksonville State University (Doc 3462), University of Montevallo (Doc 3463), the University of Alabama System and its member institutions (Doc 3465), University of North Alabama (Doc 3466), Auburn University (Doc 3467), and the State of Alabama (Doc 3469).

[2] "Doc ___" refers to documents in the record as numbered in the district court's docket sheet. "Doc ____ - p. __" refers to specific page numbers in record documents. "App. Br." refers to pages of the Appellants' Brief filed in this Court.

addressed at a December 5, 2006, fairness hearing, the district court on December 12, 2006, entered an Order and Final Judgment approving the settlement agreements, dismissing all related appeals not previously severed, and dismissing all claims against the defendants brought by the class plaintiffs and the United States. Doc 3518.

Appellants, two unnamed class members who jointly filed timely written objections to the settlement agreements on behalf of themselves and as officers of the Alabama Black Faculty Association,[3] appealed.[4] Doc 3522.

STATEMENT OF FACTS

On July 11, 1983, the United States filed suit against the State of Alabama, its Governor, the Superintendent of Education, the State Board of Education, the Alabama Commission on Higher Education, the Alabama Public School and College Authority, and ten public colleges and universities alleging that the defendants had established and maintained a racially dual system of public higher education and that vestiges of the dual system remain, in violation of Title VI, 42

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[3] On April 19, 2007, this Court ruled that appellants could proceed with their appeal as individual class members, but dismissed their appeal to the extent they brought it as representatives of the Alabama Black Faculty Association. Order page 2.

[4] The Order and Final Judgment included modifications that addressed the State's and AAMU's objections. See, *e.g.*, Doc 3518 - pp. 66-68.

U.S.C. 2000, and the Fourteenth Amendment. *United States* v. *Alabama*, 628 F. Supp. 1137, 1140 (N.D. Ala. 1985). The Knight plaintiffs, representing all black citizens of Alabama and all past, present and future students, faculty, staff and administrators of Alabama State University and Alabama A&M University, and having filed a separate action in the Middle District of Alabama, see *Knight* v. *James*, 514 F. Supp. 567 (M.D. Ala. 1981), intervened to assert their own claims under Title VI and 42 U.S.C. 1983. *Id.* at 568. Alabama State University and Alabama A&M were subsequently realigned as plaintiffs. *Knight* v. *Alabama*, 787 F. Supp. 1030, 1049 (N.D. Ala. 1991).

1. 1991 Remedial Decree

After a lengthy trial, see *United States* v. *Alabama*, 628 F. Supp. 1137 (N.D. Ala. 1985), an appeal, see *United States* v. *Alabama*, 828 F.2d 1532 (11th Cir. 1987), and a second trial before a different judge following remand from this Court, see *Knight* v. *Alabama*, 787 F. Supp. 1030 (N.D. Ala. 1991), the district court found numerous "actionable vestiges of discrimination surviving" in Alabama's system of higher education. *Knight* v. *Alabama*, 787 F. Supp. at 1368. These involved: (1) disparate levels of state funding for higher education between historically white universities (HWUs) and historically black colleges and universities (HBCUs); (2) inferior facilities at the HBCUs; (3) racial discrimination

in faculty and administrative employment throughout the system; (4) disparate and racially-based admissions policies; and (5) program duplication, whereby HWUs duplicated high-demand course offerings at neighboring HBCUs. *Ibid.* The district court entered a comprehensive remedial order designed to remove the vestiges of segregation operating within Alabama's system of higher education. Specifically, the colleges and universities were ordered to improve their recruitment and hiring to achieve a more desegregated faculty and administration, *id.* at 1378; the State's funding formula was changed so as not to disproportionately affect the HBCUs, *id.* at 1378-1379; the State was ordered to pay over $20 million to AAMU and ASU to address critical capital needs caused by a history of discrimination in funding, *id.* at 1283, 1379; Auburn University was ordered to modify its admission policies so as not to have a disproportionate impact on black applicants, *id.* at 1379; and, the State was ordered to eliminate unnecessary program duplication between HBCUs and HWUs, consider establishing cooperative programs between the HBCUs and HWUs, and give preference for some new high demand programs to the HBCUs, *id.* at 1379-1380. ASU was ordered to develop a program to recruit white students, *id.* at 1380, and a state-wide monitoring committee was established to make comprehensive annual compliance reports to the court, *id.* at 1380-1381. The district court retained

jurisdiction over the case for ten years "to insure compliance with the Decree's terms and objectives." *Id.* at 1381.

The Knight plaintiffs appealed portions of the district court's decision to this Court. Applying the Supreme Court's intervening decision in *United States* v. *Fordice*, 505 U.S. 717, 112 S. Ct. 2727 (1992), this Court remanded the case to the district court for it to determine whether continuing segregative effects existed and, if so, whether "there are practicable and educationally sound policies that would reduce or dismantle the segregative effects." *Knight* v. *Alabama*, 14 F.3d 1534, 1546 (11th Cir. 1994).

2. 1995 Remedial Decree

On remand, the district court, using the *Fordice* standard, found continuing segregative effects and entered another comprehensive remedial decree. *Knight* v. *Alabama*, 900 F. Supp. 272 (N.D. Ala. 1995). The 1995 Remedial Decree focused on general funding, scholarship funding, avoiding program duplication, developing new high demand programs, and oversight. Specifically, the decree created an endowment program (the Trust for Educational Excellence) at both ASU and AAMU that would provide ASU and AAMU State funds of up to $2 million for a period of 15 years to be used for educational purposes (*e.g.*, scholarships, endowment of department chairs, subsidizing faculty salaries). *Id.* at 349-356.

The district court ordered the State to fund scholarships at both ASU and AAMU for ten years to assist the universities' efforts to diversify their student bodies. *Id.* at 356-358. The court also restricted the expansion of two-year and technical colleges in Montgomery and Huntsville so as to help ASU and AAMU in their efforts to attract more non-minority students to their programs. *Id.* at 358-359. The court unified Auburn University's and AAMU's historically separate land grant functions and gave AAMU some unique land grant programs. *Id.* at 360-368.

To avoid program duplication between the HBCUs and HWUs, the district court ordered that some new high demand programs and degree offerings be implemented at ASU and AAMU. *Id.* at 370. These included a program of Allied Health Sciences and the development of up to two new Ph.D. or Ed.D. programs at ASU. *Id.* at 370-371. The court also directed that ASU shall be the only institution in the Montgomery area to offer a Master's Degree in Accounting for a period of five years. *Id.* at 371. AAMU was authorized to establish an undergraduate mechanical and electrical engineering program. *Id.* at 371.

Finally, the district court established a long-term planning and oversight committee to assist with, and to report upon the progress of, implementing the decree. *Id.* at 368-369. The district court retained jurisdiction over the case for ten years "to insure compliance with the decree's terms and objectives." *Id.* at 374.

The decree was set to automatically terminate unless a party sought its extension, or the court determined that additional time beyond ten years was required to insure compliance and fully accomplish the decree's objectives. *Ibid.*

3. Effects Of The Two Decrees And Accompanying Orders

Over the more than two-decade course of this litigation, the two remedial orders (and supplemental orders entered to clarify, support, and carry out the two remedial orders) have been quite successful. As noted above, the orders created scholarships at ASU and AAMU to help integrate their student bodies, established endowment trusts, and provided for the construction of new facilities at ASU and AAMU. These efforts have paid off; the 2005 Annual Report that the statewide monitoring committee provided the court shows that undergraduate enrollment by white students at AAMU and ASU has increased by approximately 37% and 633%, respectively, between 1991 and 2004. Doc 3343, Attachment 4, p.1. Moreover, most of the HWUs throughout Alabama have seen a significant increase in undergraduate enrollment by black students during this same time period. Doc 3343, Attachment 4, p.1. For example, enrollment by black students at Alabama's flagship schools – the University of Alabama and Auburn University – increased by approximately 25% and 52%, respectively. Doc 3343, Attachment 4, p.1. And undergraduate enrollment by black students at the HWUs located in Montgomery

and Huntsville (where ASU and AAMU are located, respectively) increased considerably. See Doc 3343, Attachment 4, p.1 (showing increase of nearly 38% at Auburn University in Montgomery; nearly 195% at Troy State University in Montgomery; nearly 115% at University of Alabama in Huntsville; 94% at Calhoun State Community College in Huntsville; and 70% at Athens State University in Huntsville). In all, the black undergraduate enrollment at the HWUs in Alabama increased by almost 9,000 students between 1991 and 2004. Doc 3343, Attachment 4, p.1.

The remedial decrees also funded efforts to increase African-American representation on the faculties and administrations of the HWUs. According to the 2005 Report, the number of black full-time faculty members at the University of Alabama increased from 24 in 1991 to 49 in 2004, and the number of black full-time faculty members at Auburn University increased from 22 to 52 during this same period. Doc 3343, Attachment 7, p.1. Between 1991 and 2004, the total number of black full-time faculty members at the HWUs in Alabama increased from 179 to 336. Doc 3343, Attachment 7, p.1. The 2005 Report also indicates that African-American representation on the executive, administrative, and managerial staffs of the HWUs has increased, as well. Doc 3343, Attachment 8, p.1.

Finally, the 2005 Report indicates that ASU and AAMU have received over $215 million in state funding to eliminate the vestiges of historical financial discrimination as a result of this litigation, resulting in significant improvements to those universities' physical plants and academic programs. Doc 3343, Attachment 16, p. 5.

4. 2006 Court Order

On February 8, 2006, the district court directed that ASU be provided nearly $36 million in additional capital funding for facility construction and renovation to support the new academic programs that were established under the 1995 Remedial Decree. Doc 3401. Both the plaintiffs and the State defendants appealed the order to this Court, see *Knight* v. *Alabama*, No. 06-13232 (11th Cir.); that appeal was voluntarily dismissed by the parties, however, after the district court approved the settlement agreement between the plaintiffs and the State defendants.

5. Current Settlement Litigation

In 2005, the parties engaged in settlement discussions, see, *e.g.*, Doc 3359, but were unable to reach an agreement that would conclude the ongoing litigation, see, *e.g.*, Doc 3363. Various parties, including the United States, thereafter objected to the "ten-year" automatic termination of the remedial decrees. See, *e.g.*, Docs 3374, 3372, 3377. The United States objected because funding for the Trust

for Educational Excellence that was designed to generate funds for ASU and AAMU to use for educational purposes, and for the new high demand programs and degrees offered at ASU and AAMU, remained either incomplete or unresolved. Doc 3374 - p. 5. Litigation continued while the parties once again engaged in settlement discussions – this time, successfully.

a. Settlement Agreement Between Plaintiffs And The State Of Alabama

The settlement agreement between the plaintiffs and the State defendants contains provisions concerning need-based financial aid, and requires the State defendants to take certain financial action, or to recommend certain financial action, to the Legislature. Doc 3518 - pp. 41-42; see also Doc 3469. It also contains provisions pertaining to scholarships, the Trust for Educational Excellence, the new high demand programs established by the Remedial Decree, and capital funding at ASU and AAMU. Doc 3518 - p. 42; see also Docket No. 3469.

Specifically, the settlement requires the state to continue to fund the Trusts for Educational Excellence established by the 1995 Remedial Decree under the terms and for the duration set forth in that decree. See Doc 3469 - p. 11. The settlement also requires the State to continue to fund the educational programs newly established at ASU under the 1995 Remedial Decree for the duration of the

period set forth in previous court orders. See Doc 3469 - p. 12. It further requires the State to transfer $7.3 million in capital funding to AAMU, and $25 million in capital funding to ASU, to support the new educational programs ordered under the 1995 decree. See Doc 3469 - pp. 14-15. The settlement acknowledges that the Governor has agreed to request and support in the 2007-2008 education budget an appropriation to ASU of an additional $11.9 million in capital funding, and an appropriation to AAMU of an additional $365,000 in capital funding. Doc 3469 - p. 16. In total, the State has agreed to provide over $33 million in capital funding to AAMU and ASU, and to support a request to the legislature for an additional $12 million in capital funding for these two universities.

The settlement agreement between the plaintiffs and the State Board of Education also provides for an increase in need-based financial assistance at Athens State University and Calhoun State Community College for two years. Doc 3518 - p. 40; see also Doc 3452.

b. Settlement Agreements Between The Plaintiffs And Individual Universities

The settlement agreements between the Knight-Sims plaintiffs and the various defendant universities are all similar. Each provides for the universities to develop Strategic Diversity Plans and prepare Strategic Diversity Reports, and each sets the term of the agreement at five years. See Doc 3518 - p. 39. These

agreements also require the universities to recruit, fairly hire, and seek to retain African-American faculty and professional level administrators. See Doc 3518 - pp. 40-41; see also, *e.g.*, Docs. 3460, 3465.

c. Fairness Hearing

In October 2006, the parties began filing motions to approve the settlement agreements. See, *e.g.*, Docs. 3460-3463, 3465-3467, 3469. The district court preliminarily approved the settlement agreements on October 27, 2006, finding them "fair, reasonable, and consistent with the requirements of the Constitution and the laws of the United States." Doc 3478 - p. 3. The court further found, "preliminarily, that the Defendants have satisfied their constitutional and statutory burdens of eliminating, to the extent practicable and consistent with sound educational practice, the vestiges of *de jure* segregation remaining in their institutional conditions, policies, and practices, and by entering into their respective settlement agreements have continued to demonstrate their commitment to continuing to operate in a constitutional and non-discriminatory fashion." Doc 3478 - p. 3.

In its order preliminarily approving the settlement agreements, the court required notice be given to the class, set a deadline for objections, and scheduled a fairness hearing for December 5, 2005. The court required notice of the proposed

settlement agreements to be published once a week for two weeks in the legal notice section of nine major newspapers in Alabama. See Doc. 3478 - p. 8. The text of the settlement agreement with the State defendants was to be posted on the web sites of the State of Alabama, the Governor, and the Alabama Commission on Higher Education (ACHE), and the text of the settlement agreement with each of the defendant universities was to be available on that university's web site. See Doc 3478 - p. 7. Finally, all of the settlement agreements were to be made available for viewing on the plaintiff class's website, and to be available for review and copying at the main library of every state university in Alabama. See Doc 3478 - p. 7. Any objections to the proposed settlements by class members were to be filed with the court by November 27, 2006. See Doc. 3478 - pp. 4, 7.

Appellants Munchus and Strain, and four other members of the plaintiff class, filed timely written objections to the settlement agreements. Appellants did not specify to which of the ten settlement agreements they were objecting; rather, their broad objections covered certain aspects of several of the proposed settlement agreements. For example, appellants broadly objected that "[t]he proposed settlement does not fairly and adequately represent the legal and economic interests of the members of the class," nor does it "adequately address the requirements of good faith compliance with the terms of the remedial decrees." Doc 3496 - p. 2.

Appellants also objected that "defendants failed to demonstrate that the vestiges of segregation have been eliminated to the extent practicable and to the extent consistent with sound educational practices." Doc 3496 - p. 2. Appellants also objected to some of the agreements' focus on "diversity," arguing that "diversity" is an undefined legal element which does not address Alabama's previous practice of maintaining segregated educational systems. Doc 3496 - p. 2. Finally, appellants objected that the five-year self-enforcement provision included in the agreements was "an insufficient time period to assure compliance" with the agreements' terms. Doc 3496 - p. 3.

At the fairness hearing on December 5, 2006, John Knight and Alease Sims, the class representatives, addressed the court and supported the settlements. See Doc 3526 - p. 11 ("We support the settlements that we've reached."); see also Doc 3526 - p. 17 ("[W]e fully support this settlement."). Both acknowledged that while they felt some vestiges of segregation have not been entirely eliminated, they "agreed that the [defendants] have complied with the decrees issued by [the district court], and that it's not practicable to obtain further relief from the court." Doc 3526 - p. 13; see also Doc 3526 - pp. 10-11. Named plaintiff Knight stated that "[t]his litigation has amply served to commence the process of elimination of vestiges of racial segregation in higher education in Alabama. The gauntlet is now

passed to the Boards of Trustees and the University * * * leadership of A&M and ASU, the state legislature and the office of the governor to safeguard and build upon the truly substantial strides that we, as plaintiffs in this lawsuit, have worked so hard and so long to achieve." Doc 3526 - pp. 16-17.

Counsel for the Knight class addressed the objections. He stated that "the named plaintiffs have carried the burden of representing the entire class" and had taken "into account the realistic limitations, both political and legal, as they existed at the time the suit was brought and as they have developed through the * * * Supreme Court over time." Doc 3526 - pp. 18-19. Class counsel continued that the named plaintiffs supported the settlements because "they believe that the transition from the judicial to the political process that these settlement agreements call for provide the best hope for continuing the progress towards eliminating vestiges" of segregation. Doc 3526 - p. 19.

The United States informed the court that its reasons for objecting to the termination of the 1995 Remedial Decree had been resolved by the settlements. Doc 3526 - p. 42. That is, the grounds upon which the United States objected to the termination of the 1995 Remedial Decree – incomplete funding for the Trusts for Educational Excellence at ASU and AAMU, and incomplete/unresolved funding for the new, high demand programs at ASU and AAMU – were resolved

by the settlement agreement between the plaintiffs and the State defendants. Under that agreement, the State agreed "to fund the Trusts for Educational Excellence [at ASU and AAMU] established by the Remedial Decree under the terms and for the duration established by the Decree," (*i.e.*, up to $2 million annually for a period of fifteen years), and to continue to fund the educational programs newly established at ASU for the duration of the period set forth in previous court orders, and to provide additional capital funding to ASU and AAMU in support of the new educational programs ordered under the 1995 Remedial Decree. Doc 3469 - pp. 11-14.

At the close of the hearing, the district court concluded that the notice given to the class members "was adequate, thorough and [met] the requirements of the constitution for due process." Doc 3526 - p. 31. The court agreed that while all the vestiges of segregation may not have been removed from Alabama's institutions of higher education, the vestiges had been removed "to the extent practical, insofar as the ability of [the] court to assist with its decrees and its efforts at leadership through its decrees." Doc 3526 - pp. 31-32. The court concluded that the settlements were arrived at "with a view toward the best interest of the parties," and that the named plaintiffs adequately represented the class. Doc 3526 - p. 32. The court further concluded that objections from the class were "minimal" when

compared to the size of the class, but emphasized that the objections would not be ignored by the court. Doc 3526 - p. 32. The court concluded that the settlements met the requirements of *United States* v. *Fordice*, 505 U.S. 717, 112 S. Ct. 2727 (1992), and were in the best interest of all parties to the case. Doc 3526 - pp. 32-33. The court also concluded that the agreements were made in good faith, and the court was thus "fully confident that these settlements will be carried out," even if some provisions were not immediately judicially enforceable. Doc 3526 - p. 33.

d. District Court's Decision

On December 12, 2006, the district court entered a final order approving the settlement agreements and dismissing the case. Doc 3518. The court found that notice provided to the class satisfied the requirements of Federal Rule of Civil Procedure 23(e) and the Due Process Clause of the Fourteenth Amendment. Doc 3518 - p. 47. The court further found that the "Plaintiff class representatives adequately represented the class," and that the class was represented by able and experienced counsel. Doc 3518 - p. 50. The court next concluded that the settlement agreements were not the result of fraud or collusion. Doc 3518 - p. 52.

Thereafter, the court considered nine factors typically used in evaluating settlements, see pp. 24-30, *infra*, and concluded that, based on those factors, the settlements were fair, adequate and reasonable. Doc 3518 - pp. 55-78. The court

expressly considered the written objections submitted by a few members of the plaintiff class, and concluded that those objections "do not implicate whether Defendants have satisfied the requirements of *Fordice*, and do not indicate that terminating the Remedial Decree is inappropriate." Doc 3518 - pp. 71-72.

The court also concluded that the defendants had complied in good faith with the requirements of the 1991 and 1995 Remedial Decrees, and had satisfied

> their constitutional and statutory burdens of eliminating, to the extent practicable and consistent with sound educational practice, the vestiges of *de jure* segregation remaining in their institutional conditions, policies, and practices, and have demonstrated their commitment to continuing to operate in a constitutional and non-discriminatory fashion, and that with the approval of the proposed Settlement Agreements, * * * the system is unitary.

Doc 3518 - pp. 76-77. The court thus approved the Settlement Agreements. Doc 3518 - pp. 84-94. Appellants Munchus and Strain, two class members who filed timely written objections to the settlement agreements, appealed.

STANDARD OF REVIEW

This Court reviews a district court's approval of a settlement agreement in a class action for abuse of discretion. *Cotton* v. *Hinton*, 559 F.2d 1326, 1331 (5th Cir. 1977).[5] This Court reviews the facts of the case in the light most favorable to

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[5] In *Bonner* v. *City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (*en banc*), this Court adopted as binding precedent all of the decisions of the former Fifth

(continued...)

the lower court's approval of the settlement. *Holmes* v. *Continental Can Co.*, 706 F.2d 1144, 1145 (11th Cir. 1983).

SUMMARY OF ARGUMENT

The district court acted well within its discretion when it approved the settlement agreements between the plaintiffs and the several defendants and ended over twenty-five years of litigation involving Alabama's efforts to desegregate its higher education system. The district court carefully considered and evaluated each of the factors this Court has previously identified as relevant to a settlement approval decision. Drawing on its acute familiarity with this litigation, gained from supervising a comprehensive trial, entering and enforcing a detailed remedial order, and overseeing the case for more than a decade, the district court reasonably concluded that the settlements were fair, adequate and reasonable.

Nor did the district court abuse its discretion when it approved the settlement agreements over the appellants' objections. None of appellants' objections provides an adequate legal basis upon which to reject the settlements. First, notice to the class complied with Federal Rule of Civil Procedure 23(e). The notice was published eighteen times over a two week period in nine major Alabama

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[5](...continued)
Circuit handed down prior to October 1, 1981.

newspapers, the text of the settlement agreements were readily available on state, university, and public web sites, and the plaintiff class had more than 30 days within which to submit objections. Second, the district court's decision to approve the settlements fully complies with *United States* v. *Fordice*, 505 U.S. 717, 112 S. Ct. 2727 (1992). The district court reasonably concluded that its 1991 and 1995 Remedial Decrees were designed to eliminate the vestiges of segregation existing within Alabama's system of higher education. Although a few of the requirements of the 1995 decree remain unfulfilled, those requirements are provided for in the settlement agreement with the State defendants. Thus, compliance with the settlement agreements would, to the extent practicable and consistent with sound educational practices, remove those vestiges of segregation that remain and that are reasonably addressed through legal means. That some vestiges of segregation may remain even after compliance with the settlement agreements does not render the settlements unfair, inadequate or unreasonable. The district court reasonably concluded, based on its decades-long familiarity with this case, that the legislative process now provides the arena within which to address any vestiges of segregation that may remain.

Finally, the self-enforcement provisions of some of the settlements do not render the agreements unfair, inadequate or unreasonable. The most

comprehensive settlement agreement – that between the plaintiffs and the State – remains under the district court's jurisdiction for five years. Moreover, the district court reasonably concluded that mediation provided a proper enforcement mechanism for some of the agreements, given that prior orders issued in this litigation had been promptly complied with by the defendants. Under these circumstances, the court did not clearly abuse its discretion in approving the settlement agreements.

ARGUMENT

THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN APPROVING THE SETTLEMENT AGREEMENTS

Federal Rule of Civil Procedure 23(e) requires judicial approval of any class action settlement. The Rule states that "[t]he court must approve any settlement, voluntary dismissal, or compromise of the claims, issues, or defenses of a certified class. * * * The court must direct notice in a reasonable manner to all class members who would be bound by a proposed settlement, voluntary dismissal, or compromise." Fed. R. Civ. P. 23(e). Before approving a settlement, the district court must find that it "is fair, adequate and reasonable and is not the product of collusion between the parties."[6] *Cotton* v. *Hinton*, 559 F.2d 1326, 1330 (5th Cir.

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[6] Appellants do not allege that the settlements were entered into as a result of

(continued...)

1977).

This Court has outlined several factors to be used in making that determination: (1) the likelihood of success at trial; (2) the range of possible recovery; (3) the point on or below the range of possible recovery at which a settlement is fair, adequate and reasonable; (4) the complexity, expense and duration of litigation; (5) the substance and amount of opposition to the settlement; and (6) the stage of proceedings at which the settlement was achieved. *Cotton*, 559 F.2d at 1330-1331; see also *In re Domestic Air Transp. Antitrust Litig.*, 148 F.R.D. 297, 312 (N.D. Ga. 1993). Additional factors include: (1) the presentations of counsel; (2) the comments of class members and representatives; (3) the judge's own knowledge of the case obtained during pretrial proceedings; and (4) information provided by persons who may be appointed by the court as special masters to assess the settlement. *In re Domestic Air*, 148 F.R.D. at 312.

The determination whether a settlement is fair "is left to the sound discretion of the trial court," and this Court "will not overturn the court's decision absent a clear showing of abuse of that discretion." *Bennett* v. *Behring Corp.*, 737 F.2d 982, 986 (11th Cir. 1984). In reviewing a district court's approval decision, this

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[6](...continued)
collusion. App. Br. at 17.

Court must determine whether the district court's decision was "based on adequate and careful analysis of the facts of the case in relation to the relevant principles of applicable law." *Leverso* v. *Southtrust Bank of Al.*, 18 F.3d 1527, 1531 (11th Cir. 1994). This Court's "judgment is informed by the strong judicial policy favoring settlement as well as by the realization that compromise is the essence of settlement." *Bennett*, 737 F.2d at 986. Indeed, "settlements of class actions are highly favored in the law and will be upheld whenever possible because they are means of amicably resolving doubts and preventing lawsuits." *In re Domestic Air*, 148 F.R.D. at 312.

A. The District Court Carefully Considered The Relevant Factors In Deciding To Approve The Settlement Agreements

The district court considered and addressed all of the factors this Court has identified as relevant to a settlement approval decision before concluding that the settlement agreements were fair, adequate and reasonable. Doc 3518 - pp. 53-78. The court began by considering the parties' likelihood of success, and was benefitted in its analysis by "two bench trials and numerous hearings conducted by the Court and regular communications and reports received from counsel, from the Oversight Committee, and from the Special Master." Doc 3518 - p. 58; see *In re Domestic Air*, 148 F.R.D. at 312. The court's acute familiarity with every aspect of this particular litigation, gained from its supervision of the second trial, entry of

detailed findings of fact and the 1995 Remedial Decree, and oversight of the case for more than a decade, informed its conclusion that this particular factor weighed in favor of accepting the settlement agreements. Doc 3518 - pp. 59-60.

The district court also reasonably concluded that the stage of the proceeding at which settlement was reached – after two trials, years of remedial action, extended court supervision, and additional, recent discovery (including discovery concerning the areas of objections to termination of the Remedial Decree) – provided the parties with sufficient facts and information concerning the potential merits of their respective cases prior to entering into settlement agreements. Doc 3518 - pp. 60-61. All these circumstances weigh in favor of accepting the settlement agreements. *In re Domestic Air*, 148 F.R.D. at 314 (concluding that the voluminous record and the progress of the class action put the parties "in a position to realistically assess the merits of their cause").

The district court also reasonably concluded that the relief proposed in the settlement agreements was within the range of possible remedies permitted by law, holding that it "is the most practicable and efficient means of furthering" the goals of removing any remaining vestiges of segregation. Doc 3518 - pp. 62-63; see *Cotton*, 559 F.2d at 1330 ("The settlement terms should be compared with the likely rewards the class would have received following a successful trial of the

case."); see also Doc 3518 - p. 45 (explaining that the proposed Settlement Agreements "are designed to serve the purposes of the Court's 1991 and 1995 Remedial Decrees, as well as the ultimate goal of this litigation: to eliminate to the extent practicable vestiges of *de jure* segregation"). Again, the court's experience in entering the 1995 Remedial Decree obviously played a critical role in its conclusion that the settlements were reasonable. Indeed, the settlement agreements simply provide an alternate means of fulfilling the remaining requirements of the prior decrees – decrees that were specifically designed to eliminate, and to a great extent have eliminated, the vestiges of segregation. These findings fully support the district court's determination that the provisions of the settlement agreement "fall[] at a point in the range that is fair to the class." *In re Domestic Air*, 148 F.R.D. at 319.

As stated *supra*, pp. 9-10, enforcement of the Remedial Decrees has resulted, over time, in appreciable desegregation of the HWUs' student bodies and faculties, the enrollment of significant numbers of non-minority students at the HBCUs, the substantial enhancement of facilities and course offerings at the HBCUs, much needed improvements of the physical plants at ASU and AAMU, and the creation of an important and unique land grant program at AAMU. The admirable results of this litigation are precisely along the remedial lines dictated by

Fordice. The public, state-wide system that exists today in Alabama is hardly the racially segregated and unfairly maintained system that confronted the federal judiciary in 1983.

The complexity, expense and duration of litigation further support the district court's decision to approve the settlements. As the district court noted, the litigation has been pending for over 25 years at considerable time and expense to the parties, the district court, the Special Master, the Oversight Committee, and this Court. Doc 3518 - p. 64; see *Cotton*, 559 F.2d at 1331 ("In these days of increasing congestion within the federal court system, settlements contribute greatly to the efficient utilization of our scarce judicial resources."); see also *In re Domestic Air*, 148 F.R.D. at 325-326.

The district court also considered the few objections that were raised with respect to the proposed settlement agreements and properly concluded that none supported a rejection of the proposed agreements. For example, AAMU's objection pertained to a restriction on the funds provided by the State under the agreement; the district court modified the settlement such that a portion of the funds could be used by the university for needed repairs. Doc 3518 - pp. 66-68. Moreover, the State entered a conditional objection pertaining to how its agreement with the plaintiffs was to be interpreted in light of the other agreements; the district

court included language in its final Order that resolved the State's concerns. Doc 3518 - pp. 67-68.

The court also addressed the objections raised by six class members and concluded that none was legally sufficient to withhold approval of the settlements. See Part I.B., *infra*. Most of these, the court concluded, raised individual concerns – such as individual faculty and administrative employment issues – that were outside the goals of the litigation. See Doc 3518 - p. 69. Most importantly, however, the district court concluded that the Defendants will meet their constitutional and statutory obligations set forth in *Fordice* and the 1991 and 1995 Remedial Decrees by complying with the terms of the Settlement Agreements. See Doc 3518 - pp. 68-70.

This conclusion is clearly reasonable, as the settlement agreements ensure that the defendants will fulfill the remaining requirements of the prior remedial decrees. For example, under the settlement agreement with the State defendants, the State will continue to fund the endowment trusts under the terms of the 1995 Decree, and the State will provide funding for the new high demand programs established at ASU under the 1995 Decree that will help ASU attract qualified non-minority students and enhance its academic reputation, but have yet to be fully implemented. See pp. 12-13, *infra*. The settlement agreement with the State

ensures that the responsibility the State was assigned in 1995 to provide necessary financial support to ASU and AAMU will be satisfied. Thus, the district court properly "examine[d] the settlement[s] in light of the objections raised and set forth on the record a reasoned response to the objections." *Cotton*, 559 F.2d at 1331. Moreover, the "substance and amount of opposition" to the proposed settlements did not, and do not, weigh against approving the settlement agreements. *Bennett*, 737 F.2d at 986; see also *Cotton*, 559 F.2d at 1331 (explaining that "the number of objectors is a factor to be considered but is not controlling").

Finally, the court reasonably concluded that the fees paid to counsel and the absence of any monetary awards paid to class members further weighed in favor of approving the settlements. The court explained that, based on its "considerable familiarity with attorneys' fees in class action cases and in this particular case," that the fees paid to the attorneys were reasonable, "especially in light of the time and effort that counsel for the Plaintiff class expended on this case." Doc 3518 - pp. 72-73. The court also explained that the fact that none of the settlements provides monetary relief to the named Plaintiffs and all class members receive identical treatment under the settlements supports approval of the settlement agreements. Cf. *Holmes* v. *Continental Can Co.*, 706 F.2d 1144, 1148 (11th Cir. 1983 ("Although there is no rule that settlements benefit all class members equally,

* * * a disparate distribution favoring the named plaintiffs requires careful judicial scrutiny into whether the settlement allocation is fair to the absent members of the class.").

* * * * *

Determining the fairness of a settlement agreement "is left to the sound discretion of the trial court," and this Court "will not overturn the court's decision absent a clear showing of abuse of that discretion." *Bennett*, 737 F.2d at 986. The record demonstrates that the well-informed district court carefully identified the guidelines established by this Court governing approval of class action settlements, and made findings of fact that the proposed settlements were fair, adequate and reasonable. *Ibid.* Final approval of the settlement was preceded by a preliminary hearing, notice to class members, receipt by the court of written objections by class members, and a hearing on the merits during which all objectors' concerns were addressed. *Id.* at 986-987. In its Order and Final Judgment, the district court "devoted lengthy consideration to all timely objections to the settlement and meticulously applied the lengthy guidelines of this court as to class actions and settlements." *Id.* at 987. Far from a clear abuse of discretion, the district court's Order and Final Judgment approving the proposed settlement agreements, and ultimately terminating the Alabama higher education litigation, reflects a careful

and thorough review of both the proposed settlement agreements and the entirety of this 25-year litigation.

B. Appellants' Objections To The Settlement Agreements Do Not Warrant Reversal Of The District Court's Approval Decision

Appellants advance three general reasons why the district court should not have approved the settlements: (1) notice to the class was improper; (2) vestiges of segregation have not been completely eliminated; and (3) the self-enforcement provisions are insufficient. None of these reasons provides an adequate legal basis upon which to reverse the district court's decision. See *Bennett*, 737 F.2d at 986.

1. Notice To The Plaintiff Class Was Proper

Under Federal Rule of Civil Procedure 23(e), the district court "must direct notice in a reasonable manner to all class members who would be bound by a proposed settlement, voluntary dismissal, or compromise." Fed. R. Civ. P. 23(e)(1)(B). To meet this standard, the notice must be "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314, 70 S. Ct. 652, 657 (1950).

Here, notice was published eighteen times in a fourteen-day period at least 30 days before the December 5, 2006, fairness hearing, and the text of the settlement agreements was published on numerous web sites. Specifically, the

notice was twice-published in *nine* major Alabama newspapers over the course of two weeks; the entire text of the settlement agreements were posted on *three state web sites*; individual settlement agreements were posted on *each defendant school's web site*; the entire text of the settlement agreements was available for viewing on *the plaintiff class's web site*; and all of the settlement agreements were available for viewing and copying at the main library of *every state university in Alabama*. See Doc 3478 - pp. 7-8. This manner of publication was reasonably calculated to reach the members of the class. See, *e.g.*, *Mendoza* v. *United States*, 623 F.2d 1338, 1351 (9th Cir. 1980) (notice published 13 times over one-week period in two newspapers was reasonably calculated to reach members of class in school desegregation case).

Moreover, class members had more than 30 days within which to submit objections to the proposed settlements. The length of time afforded class members within which to object was certainly reasonable. *Miller* v. *Republic Nat'l Life Ins. Co.*, 559 F.2d 426, 430 (5th Cir. 1997) (holding that notice provided nearly four weeks before scheduled settlement hearing satisfied due process requirements); see also *Grunin* v. *International House of Pancakes*, 513 F.2d 114, 121 (8th Cir.), cert. denied, 423 U.S. 864, 96 S. Ct. 124 (1975) (notice sent nineteen days prior to settlement hearing). During the time-period the district court provided, several

other class members besides appellants submitted written objections, and no class member sought additional time within which to file objections. See *Miller*, 559 F.2d at 430; see also *Mendoza*, 623 F.2d at 1351.

2. Vestiges Of Segregation Have Been Removed To The Extent Practicable And Consistent With Sound Educational Practices

Under *United States* v. *Fordice*, 505 U.S. 717, 729, 112 S. Ct. 2727, 2736 (1992), "[i]f policies traceable to the *de jure* system are still in force and have discriminatory effects, those policies * * * must be reformed to the extent practicable and consistent with sound educational practices." Appellants argue (App. Br. at 17-18, 19-21) that because parties to the settlement agreements acknowledged that vestiges of segregation remain, the district court abused its discretion in approving the settlement agreements. Appellants' argument fails for several reasons.

First, whether all vestiges of segregation have been eliminated to the extent practicable and consistent with sound educational policies must be considered an issue of both fact and law underlying the dispute between the parties. But it "cannot be overemphasized" that, in determining the fairness, adequacy, and reasonableness of a proposed settlement, "neither the trial court in approving the settlement nor this Court in reviewing that approval have the right or the duty to reach any ultimate conclusions on the issues of fact and law which underlie the

merits of the dispute." See *Cotton*, 559 F.2d at 1330; see also *Pettway* v. *American Cast Iron Pipe Co.*, 576 F.2d 1157, 1214 n.69 (5th Cir. 1978). The trial court must focus instead upon the "terms of settlement," recognizing that "compromise is the essence of a settlement." *Cotton*, 559 F.2d at 1330. Indeed, "the settlement need not accord the plaintiff class every benefit that might have been gained after full trial." *Pettway*, 576 F.2d at 1214 n.69.

Second, the district court identified in its 1995 Remedial Decree what action needed to be taken to eliminate the vestiges of segregation, consistent with *Fordice*, that remained in Alabama's system of higher education. In the view of the United States, all but two of the requirements set forth in the 1995 Remedial Decree have been fully satisfied. The two outstanding requirements – continued funding for the Trusts for Educational Excellence and the high demand programs at ASU – formed the basis of the United States' objection to the termination of the 1995 decree. In the opinion of the United States, fulfilling those requirements would, to the extent practicable and consistent with sound educational practices, remove the remaining vestiges of segregation in Alabama's higher education system. *Fordice*, 505 U.S. at 729, 112 S. Ct. at 2736. Because the two remaining provisions from the 1995 Remedial Decree have been satisfactorily addressed in the settlement agreement between the plaintiffs and the State Defendants (*i.e.*, the

State will continue to fund the trusts under the terms of the 1995 Remedial Decree, will continue to fund the new programs established at ASU under the 1995 Remedial Decree that have not yet been fully implemented, and will provide capital funding to ASU in support of the new programs), see Doc 3469, the settlement agreements fully comport with the mandate of *Fordice*. These agreements ensure that the defendants' success in meeting *Fordice*'s demands will not be fleeting.

Third, while several witnesses at the fairness hearing acknowledged that some vestiges of segregation may still remain, those comments *must* be considered in the proper context. For example, the class representatives expressed support for the settlement agreements because those remaining vestiges of segregation that *could* be removed through the legal process *had* been eliminated; what remained was more properly addressed through societal and legislative change. See, *e.g.*, Doc 3526 - pp. 10-11 ("We're not saying that vestiges of segregation have been removed. *You cannot rule on ethics, equities and the hearts of men.*") (comments of Class Representative Alease Sims); Doc 3526 - p. 13 ("By entering into the * * * settlement agreement, the plaintiffs have not agreed that the vestiges of segregation have been totally eliminated. Rather, we have agreed that the defendant State of Alabama and defendant universities have complied with the

decrees issued by [the district court], and that *it's not practicable to obtain further relief from the court*. * * * The struggle now shifts * * * from the judicial arena to the political arena.") (comments of Class Representative John F. Knight). The court recognized as much in granting preliminary approval to the settlement agreements: "The court agrees * * * that all the vestiges of discrimination have not been removed from the Alabama institutions of higher learning. They have been removed, to the extent [practicable], insofar as the ability of this court to assist with its decrees and its efforts at leadership through its decrees can be accomplished." Doc 3526 - pp. 31-32. The court made this point even more clearly in its final Order:

> [T]he Defendants have satisfied their constitutional and statutory burdens of eliminating, to the extent practicable and consistent with sound educational practice, the vestiges of *de jure* segregation remaining in their institutional conditions, policies, and practices, and have demonstrated their commitment to continuing to operate in a constitutional and non-discriminatory fashion, and that with the approval of the proposed Settlement Agreements * * * , the system is unitary. Thus, subject only to final resolution of the claims pending on appeal, the Court finds that the Defendants are in full compliance with the law, and that, therefore, there are no continuing policies, or practices, or remnants, traceable to *de jure* segregation, with present discriminatory effects which can be eliminated, altered, or replaced with educationally sound, feasible and practical alternatives or remedial measures and that, with the approval of the proposed Settlement Agreements addressed in this Order, the system is unitary; and, further, that this finding shall extend to all facets of the case and to all facets of public higher education in Alabama.

Doc 3518 - pp. 76-77.

The district court held, and we agree, that its two previous Remedial Decrees, and the terms of the Settlement Agreements, will eliminate those vestiges of segregation that reasonably can be addressed through legal means. Doc 3518 - pp. 31-32, 76-77. In its discretion, and based on its decades-long familiarity with this case and these parties, the court properly concluded that the legislative process now provides the arena within which to address any vestiges of segregation that may remain.

Finally, appellants' objection to the "Strategic Diversity Plans" provided for in many of the settlement agreements is wholly without merit. Appellants argue (App. Br. at 17-18) that diversity programs would be insufficient to meet the *Fordice* standard because one cannot measure "diversity." But appellants fail to appreciate that the "Strategic Diversity Plans" provided for in the plaintiff class's settlement agreements with many of the defendant universities recognize that "in Alabama, where the history and effects of segregation are well known, faculty and EEO-1 administrative level diversity will of necessity include increasing African-American representation." See, *e.g.*, Doc 3452 - p. 5 (agreement between plaintiffs and Defendants Alabama State Board of Education, Chancellor Roy Johnson, Athens State University, and Calhoun State Community College); Doc 3427 - p. 4

(agreement between plaintiffs and Defendant University of West Alabama); Doc 3461 - p. 5 (agreement between plaintiffs and Defendant University of South Alabama); Doc 3462 - p. 6 (agreement between plaintiffs and Defendant Jacksonville State University); Doc 3463 - p. 6 (agreement between plaintiffs and Defendant University of Montevallo); Doc 3466 - p. 6 (agreement between plaintiffs and Defendant University of North Alabama). Many of these settlement agreements also call for increasing African-American members of the defendant University's faculty and administration, see, *e.g.*, Doc 3427 - p. 4; Doc 3461 - p. 5; Doc 3462 - p. 6; Doc 3463 - p. 6; Doc 3465 - pp. 10-11 (agreement between plaintiffs and Defendant University of Alabama); Doc 3466 - p. 6; Doc 3452 - pp. 5-6; Doc 3467 - pp. 5-6 (agreement between plaintiffs and Defendant Auburn University); for African-American representation on search committees, see, *e.g.*, Doc 3427 - p. 5; Doc 3461 - p. 7; Doc 3462 - p. 8; Doc 3463 - p. 7; Doc 3465 - p. 12; Doc 3466 - p. 7; Doc 3452 - p. 6; Doc 3467 - p. 6; and for annual reports on the racial composition of students, faculty, and key university leadership, see, *e.g.*, Doc 3427 - p. 6; Doc 3461 - p. 8; Doc 3462 - pp. 9-10; Doc 3463 - pp. 9-10; Doc 3465 - p. 9; Doc 3466 - pp. 8-10; Doc 3452 - pp. 7-8; Doc 3467 - pp. 8-9. Appellants' arguments that the settlement agreements are incompatible with *Fordice* because the success of a strategic plan focused on "diversity" is immeasurable are simply

without merit.

3. The Self-Enforcement Provisions Of The Settlement Agreements Do Not Render The Agreements Unfair, Inadequate, Or Unreasonable

The district court did not abuse its discretion in approving proposed settlement agreements that contain provisions for self-enforcement, mediation, and court oversight. Contrary to appellants' contentions, not all of the agreements are enforceable solely through mediation.

Of utmost importance, the provisions included in the settlement agreement between the plaintiff class and the State defendants remain in effect until September 30, 2011. Doc 3469 - p. 26. During this time, "[a]ll parties agree that the District Court has complete jurisdiction and power to enforce" the agreement. Doc 3469 - p. 27. Thus, the critical issues of capital funding and program implementation are fully enforceable by the district court.

That some agreements are enforceable through mediation does not render the agreements unfair, inadequate or unreasonable. The district court previously noted that "every order this court has entered has been complied with promptly by state officials and by counsel for the defendants in connection with this litigation," even orders that "were not that popular" with the defendants. Doc 3526 - p. 33. The court also identified "the responsive way in which the officials of this state have replied and responded to the court's various orders" in the ongoing litigation. Doc

3526 - p. 33. Under these circumstances, it was not a clear abuse of discretion to approve those settlements that provide for enforcement through mediation.

CONCLUSION

The Court should affirm the district court's December 12, 2006, Order and Final Judgment approving the settlement agreements.

Respectfully submitted,

WAN J. KIM
Assistant Attorney General

/s/ Angela M. Miller
MARK L. GROSS
ANGELA M. MILLER
Attorneys
U.S. Department of Justice
Civil Rights Division
Appellate Section - RFK 3720
Ben Franklin Station
P.O. Box 14403
Washington, D.C. 20044-4403
(202) 514-4541

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type volume limitation imposed by Fed. R. App. P. 32(a)(7)(B). The brief was prepared using WordPerfect 9.0 and contains no more than 8944 words of proportionally spaced text. The type face is Times New Roman, 14-point font.

/s/ Angela M. Miller
ANGELA M. MILLER
Attorney

Date: May 21, 2007

CERTIFICATE OF SERVICE

I hereby certify that on May 21, 2007, a copy of the forgoing BRIEF FOR THE UNITED STATES AS APPELLEE was served by first-class mail, postage prepaid, on the following counsels of record:

George Munchus
Willie Strain
P.O. Box 130417
Birmingham, AL 35213-0417

Robert D. Hunter
Deputy Attorney General of Alabama
210 Inverness Center Drive
Birmingham, AL 35242-4834

Jeffery A. Foshee
Edward M. George
Foshee & George, LLC
900 S. Perry Street, Suite B
Montgomery, AL 36104-5022

James U. Blacksher
P.O. Box 636
Birmingham, AL 35201-0636

Norma Mungenast Lemley
University of Alabama / Office of Counsel
222 Rose Administration Building
Box 870106
Tuscaloosa, AL 35487-0001

John B. Tally, Jr.
Adams & Reese, LLP
2100 3rd Avenue, N., Suite 1100
Birmingham, AL 35203-3329

David R. Boyd
Balch & Bingham, LLP
105 Tallapoosa St., Suite 200
Montgomery, AL 36104-2549

William K. Thomas
Cabaniss Johnston Gardner Dumas & O'Neal
P.O. Box 2906
Mobile, AL 36652-2906

Armand Georges Derfner
Derfner, Altman & Wilborn, LLC
40 Calhoun St, Suite 410
Charleston, SC 29401-3531

W. Braxton Schell, Jr.
1330 21st Way S, Suite 210
Birmingham, AL 35205-3989

Fred D. Gray
Gray, Langford, Sapp, McGowan
108 Eastside Street
Tuskegee, AL 36083-1701

Randall M. Woodrow
Doster & Woodrow
P.O. Box 2286
Anniston, AL 36202-2286

Reginald L. Sorrells
Darnell Delacey Coley
Larry E. Craven
State of Alabama, Department of Education
50 N. Ripley Street
Montgomery, AL 36130-1001

Solomon S. Seay, Jr.
5510 Wares Ferry Road, Suite U5
Montgomery, AL 36117-2111

Sarah L. Thompson
P.O. Box 947
Northport, AL 35476-0947

Demetrius Newton
City Attorney / City of Birmingham
1820 7th Avenue N
Birmingham, AL 35203-2217

Susan J. Watterson
2610 19th Street S.
Birmingham, AL 35209-1914

Alice H. Martin
1801 4th Avenue, N.
Birmingham, AL 35203-2101

C. Glenn Powell
The University of Alabama System
13297 N. River Farm Drive
Northport, AL 35473-7125

Carl E. Johnson, Jr.
Bishop, Colvin, Johnson & Kent
1910 1st Avenue, N.
Birmingham, AL 35203-4006

Ed R. Haden
Edward S. Allen
Robin G. Laurie
Balch & Bingham, LLP
P.O. Box 306
1710 6th Avenue, N.
Birmingham, AL 35203-2015

Jean Walker Tucker
University of South Alabama
307 University Boulevard - AD 131
Mobile, AL 36688-0001

Joe R. Whatley, Jr.
Whatley Drake, LLC
2323 2nd Avenue, N.
P.O. Box 10647
Birmingham, AL 35202-0647

Michael G. Kendrick
Waldrep, Steward & Kendrick, LLC
2101 6th Avenue N., Suite 700
Birmingham, AL 35203-2761

Richard F. Calhoun
Calhoun, Faulk, Watkins & Faircloth, LLC
78 S Court Square
Troy, AL 36081-2610

Robert W. Rieder, Jr.
Office of Counsel, University of Alabama
235 Madison Hall
Huntsville, AL 35899-0001

Stanley Fitzgerald Gray
Gray, Langford, Sapp, McGowan, Gray & Nathanson
P.O. Box 830239
Tuskegee, AL 36083-0239

Thomas M. Lovett
UNA Box 5023
Florence, AL 35632-0001

/s/ Angela M. Miller
ANGELA M. MILLER
Attorney