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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
OAKLAND DIVISION

JUANITA WYNNE and DANTE BYRD, on behalf of themselves and classes of those similarly situated,

Plaintiffs,

v.

MCCORMICK & SCHMICK'S SEAFOOD RESTAURANTS, INC. and MCCORMICK & SCHMICK RESTAURANT CORP.,

Defendants.

Case No. C-06-3153 CW

PLAINTIFFS' NOTICE OF MOTION AND MOTION FOR ORDER: (1) PRELIMINARILY APPROVING CLASS ACTION SETTLEMENT AND PROPOSED CONSENT DECREE; (2) PROVISIONALLY CERTIFYING SETTLEMENT CLASSES; (3) APPROVING AND DIRECTING DISTRIBUTION OF NOTICE OF THE SETTLEMENT; AND (4) SETTING A SCHEDULE FOR THE FINAL SETTLEMENT APPROVAL PROCESS; MEMORANDUM IN SUPPORT THEREOF.

DATE: April 3, 2008
TIME: 2:00 p.m.
PLACE: Courtroom 2, 4th Floor
JUDGE: Hon. Claudia Wilken

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NOTICE OF MOTION

TO ALL PARTIES AND THEIR COUNSEL OF RECORD:

NOTICE IS HEREBY GIVEN that on April 3, 2008, at 2:00 p.m., or as soon thereafter as the matter may be heard in the Courtroom of the Honorable Claudia Wilken, located at 1301 Clay Street, Oakland, California, plaintiffs will and hereby do move this Court for an order (1) preliminarily approving the parties' class action settlement and proposed Consent Decree, (2) provisionally certifying settlement classes, (3) approving and directing distribution of the notice of settlement, and (4) setting a schedule for the final approval process.

This motion is based on: this Notice of Motion and Motion; the attached Memorandum of Points and Authorities; the Declaration of James M. Finberg; the [Proposed] Order and exhibits thereto; the Consent Decree; all other records, pleadings, and papers on file in this action; and on such other evidence or argument as may be presented to the Court at the hearing of this motion.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Subject to Court approval, the parties have settled plaintiffs' and class members' claims for comprehensive injunctive and monetary relief. The proposed Consent Decree resolves all of plaintiffs' and class members' claims. The parties' proposed settlement satisfies all of the criteria for preliminary approval under federal law. The settlement was negotiated at arms' length and falls well within the range of possible approval. The extensive injunctive relief provided for in the Consent Decree will materially advance the goal of equal employment opportunity for African Americans at McCormick & Schmick's. The monetary relief will give class members a monetary recovery this year without the risks and delay attendant with further litigation.

Accordingly, the plaintiff classes request that the Court grant preliminary approval to the proposed Consent Decree (attached as Exhibit 1 to the proposed order), direct distribution of the class notice and claim form (attached as Exhibits 2 and 3 to the proposed order), and approve the proposed schedule for final approval. Plaintiffs also request that in connection with the settlement process, the Court provisionally certify a settlement class of African-American employees for monetary relief (with a right to opt out of the settlement pursuant to Rule 23(e)(3)) and under Rule 23(b)(2) for injunctive relief (with no opt out right).

II. PROCEDURAL HISTORY AND BACKGROUND

Plaintiffs brought this action on behalf of themselves and a class of current and former African American employees of McCormick & Schmick's claiming that African Americans are underrepresented in the most remunerative "front of the house" restaurant jobs (servers, cocktail servers, bartender and host positions) and that African Americans who obtain employment in front of the house positions are consistently assigned to the shifts and restaurant sections that are the least remunerative.

Plaintiffs Juanita Wynne and Dante Byrd filed class-wide administrative charges with the EEOC on May 3 and June 29, 2005. On May 11, 2006 Plaintiffs filed the Complaint in this action alleging racial discrimination claims under Title VII, FEHA and Section 1981 on behalf

of themselves and classes of McCormick & Schmick's African American employees and applicants.

Plaintiffs filed their First Amended Complaint on July 28, 2006. After filing the First Amended Complaint, the parties conducted discovery. Plaintiffs took the depositions of six Rule 30(b)(6) designees relating to Company operations, hiring practices, training, compensation policies, store openings, data collection, and others. Company deponents included the Director of Human Resources, the Director of Training, the Vice President of Operations, and others. During this period, Defendants took depositions of plaintiffs Juanita Wynne and Dante Byrd.

Plaintiffs served written discovery, including interrogatories and document requests, and obtained many thousands of pages of documents from Defendants, including personnel manuals and policies, training materials, and employment applications. Plaintiffs also obtained, and with the assistance of expert statisticians analyzed, Company computerized personnel and payroll data from 2002 through 2006.

Defendants served discovery on Juanita Wynne and Dante Byrd. Juanita Wynne and Dante Byrd responded to interrogatories, produced hundreds of pages of documents related to their employment at McCormick & Schmick's, and submitted to depositions.

Plaintiffs and Defendants engaged expert consultants to analyze the payroll data, to determine whether disparities exist in hiring and compensation of African Americans in front of the house positions, and to calculate potential damages exposure. Expert consultants also assisted the parties in negotiating the settlement by proposing and analyzing various methodologies for establishing hiring benchmarks.

The Plaintiffs have vigorously prosecuted this case, and McCormick & Schmick's has vigorously contested it. As a result, the Parties were able to assess reliably the relative merits of the claims of the Plaintiffs and of McCormick & Schmick's defenses.

On July 12, September 26, and November 5, 2007, counsel for the Parties met to negotiate a settlement of this matter with the assistance of experienced mediator Hunter Hughes of Atlanta, Georgia, who served as the mediator in many other cases, including *Satchell v.*

Federal Express Corp., C03-2659 SI; C03-2878 SI (N.D. Cal.)*, Butler v. Home Depot,* No. C94 4335 SI (N.D. Cal.); *Shores v. Publix Super Markets, Inc.,* 95-1162-CIV-T-25E (M.D. Fla); and *Ingram v. Coca-Cola Co*., 200 F.R.D. 685, 699 (N.D.Ga.2001). In addition, counsel for the Parties met face-to-face without the mediator on August 8 and September 12, 2007, and exchanged numerous written settlement proposals from July 2007 through February 2008.

The formal and informal discovery conducted in this action, including the depositions, the documents produced, and the information exchanged during mediation, including expert consultant analyses, put Class Counsel in a position to assess the strengths and weaknesses of the case.

III. SUMMARY OF THE PROPOSED SETTLEMENT

The proposed consent decree provides comprehensive injunctive relief and substantial monetary relief.

A. Injunctive Relief

During the period of the Decree, McCormick & Schmick's has agreed to implement comprehensive affirmative relief addressing the selection, promotion and compensation claims in this action, including the following:

1. Increasing African American Representation in Front of the House Jobs

a. Hiring and Promotion Benchmarks

McCormick & Schmick's has agreed to establish benchmarks to assist in its efforts to hire or promote African American employees into front of the house (server, bartender, host) positions at a rate equal to African Americans' representation in the applicant pool for that position, or African Americans' representation in the relevant local labor market, whichever is higher. Consent Decree Section XI.

McCormick & Schmick's also has agreed to allow a third-party Diversity Monitor to examine its payroll data to ensure that it is taking appropriate steps to meet its benchmarks. The Diversity Monitor can require the Company to make appropriate changes to its policies to achieve diversity and ensure compliance with the Decree. Consent Decree Sections XVIII, XX.

If McCormick & Schmick's meets all of its Company-wide benchmarks for three consecutive years, the Company may apply to the court to terminate the Consent Decree at the end of the fourth year of the Decree. Consent Decree Section V. Otherwise, the Decree will be in effect for five years. *Id.*

If McCormick & Schmick's does not meet its benchmarks, the Diversity Monitor is empowered to determine the causes of such failure, and to establish remedial measures, including, among other things, requiring the Company to validate its hiring criteria, to enhance its recruitment and outreach efforts, and to establish hiring safeguards. Consent Decree Section XI(D).

b. Enhanced Recruiting Efforts

McCormick & Schmick's has agreed to hire a new Corporate Recruiter, and to make its best efforts to increase diversity in front of the house and management positions. Consent Decree Section XVI(A).

McCormick & Schmick's will develop a strategy for increasing the recruitment and hiring of African Americans, including by developing a list of recruiting sources and advertising media that reach African Americans. Consent Decree Section XVI(B).

If a restaurant's African American applicant flow declines for two years in a row, or is lower than the census-based benchmark, the Company will develop a specific plan to increase the number of African American applicants in front of the house jobs, including by enhancing its outreach and recruitment efforts. Consent Decree Section XVI(C) and (D).

c. Manager Accountability

McCormick & Schmick's has agreed to evaluate restaurant managers in part on their success in helping the Company to achieve its diversity goals, and a meaningful portion of managers' bonuses will be based on performance in helping the Company to achieve its diversity goals. Consent Decree Section XIV.

2. Opening Pathways for Promotion

McCormick & Schmick's has agreed to implement a "registration of interest" program, which will inform employees about openings at all Company restaurants in the metropolitan

area and about how to apply for such positions. Consent Decree Section XII.

Employees will be provided with an opportunity to register interest in any other restaurant-level position, and employees who meet the basic criteria for the position will be considered as applicants for that position in all area restaurants when openings arise. Consent Decree Sections XII(B) and (C).

3. Enhanced Procedures for Complaining About Race Discrimination

McCormick & Schmick's has agreed to train all of if its employees on its existing "Ethics Point" complaint system, and to enable employees to use Ethics Point to complain about shift and section assignments, the Registration of Interest program, or other measures set out in the Consent Decree. McCormick & Schmick's has also agreed to enhance its investigation procedures to ensure that every complaint is fully investigated, and to document every complaint and the steps taken to investigate each complaint. Consent Decree Section XV.

4. Monitoring and Enforcement of Decree

McCormick & Schmick's has agreed to enable a third-party Diversity Monitor to monitor these policies and practices and to ensure compliance with all terms of the Consent Decree. The Diversity Monitor will review reports of complaints of discrimination by McCormick & Schmick's employees, and will also receive and review other data and reports designed to ensure that McCormick & Schmick's is following the new policies established through this Consent Decree. Consent Decree Section XVIII(E).

The parties have agreed that Barry Goldstein will serve as the Diversity Monitor. Consent Decree Section X. Mr. Goldstein has significant experience in litigating race discrimination cases. He is a preeminent lawyer in this field. Finberg Dec., ¶31.

Throughout the term of the Consent Decree, McCormick & Schmick's will provide regular progress reports to the Diversity Monitor and to Counsel for the Plaintiffs. These reports will describe McCormick & Schmick's progress in implementing the Decree, include information about hiring and promotion of African Americans, and detail any complaints of discrimination by African American employees. McCormick & Schmick's will also provide the Diversity Monitor with data regarding the compensation of all front of the house positions by

race, to enable the Diversity Monitor to ensure that there are no racial disparities in pay. Consent Decree Section XVIII(D)(5).

If Class Counsel have grounds for believing that McCormick & Schmick's is disobeying its obligations under the Decree, Counsel may bring the matter to the attention of the Diversity Monitor or the Court. Consent Decree Sections XX, XIX.

B. Monetary Relief

In addition to the significant, comprehensive injunctive relief described above, McCormick & Schmick's will pay members of the Settlement Class $1.1 million. Consent Decree Section XXI(D)(1). This fund will compensate members of the Settlement Class who do not opt out and who timely submit claims.

Each class member who does not opt out of the settlement will receive a proportionate share of the net settlement payment. The calculation of each claimant's share will be based on a point system that awards a certain number of points for the following factors: (1) length of service; (2) status as "front of the house" or "back of the house" employee. Consent Decree Section XXVII(A).

Class members who do not opt out will be required to submit a claim form in order to receive a monetary award. A copy of the claim form is attached to the proposed preliminary approval order as Exhibit 3. Once claim forms are submitted, the claims administrator will allocate points, determine each class member's award, and distribute the settlement proceeds as soon as practicable.[1]

In recognition of Class Representative Juanita Wynne's service to the class, which included providing information regarding the structure of the company and her job duties during lengthy interviews with Class Counsel, responding to discovery and producing relevant documents, submitting to deposition, and participating in conference calls regarding the mediation process, Class Counsel will apply to the Court to award $5,000 to Ms. Wynne. The

[1] It is the intention of the parties to distribute the entire amount in the Settlement Fund Account. If, despite the claims administrator's efforts, checks remain uncashed after they have become invalid, the remaining sum shall be paid to the Administration and Monitoring Fund. *See* Consent Decree Section XXVII(E).

Consent Decree provides that any service award shall be paid from the $1.1 million allocated to class monetary relief. Consent Decree Section XXI(D)(1).

The proposed Consent Decree also provides that McCormick & Schmick's will pay an additional $900,000 to reimburse class counsel for the fees and costs they have incurred to date. Consent Decree Section XXI(D)(3). Class Counsel will file a separate motion for approval of attorneys' fees and expenses in advance of the Fairness Hearing.

The proposed Consent Decree also provides that McCormick & Schmick's will pay $90,000, for claims administration, to compensate the Diversity Monitor, and to pay fees for work performed by Class Counsel in monitoring the settlement, on an hourly basis. *See* Consent Decree Section XXI(D)(5).[2]

The proposed Consent Decree also provides that McCormick & Schmick's will pay an additional $5,000 each to named plaintiffs Juanita Wynne and Dante Byrd to compensate them for release of their non-class claims, including Ms. Wynne's potential claims for racial harassment/hostile work environment, and Mr. Byrd's claims arising out of his application for employment with McCormick & Schmick's. *See* Consent Decree Section XXI(D)(4). (Although arguably these settlements of non-class claims are not part of the class settlement, Class Counsel bring these agreements to the Court's attention pursuant to Rule 23(e)(2) of the

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[2] Any interest earned on the settlement fund, and any amounts from uncashed checks, will also be paid into the Administration and Monitoring Fund. Consent Decree Section XXI(D)(5). It is estimated that claims administration will cost approximately $50,000-$75,000. Finberg Dec., ¶34.

If there are insufficient funds in the account, the other listed items will be given priority over payment to Class Counsel. If the account has enough money to cover all of these items, Class Counsel will receive its full hourly rate for its monitoring work. Consent Decree Section XXI(D)(5)(b).

In the unlikely event that there is any amount remaining in the Administration and Monitoring Fund after termination of the Decree, Class Counsel may apply to the Court for an award of the remaining amount 1) as compensation for work performed prior to the Final Approval Date that was not compensated as part of the proposed $900,000 attorneys' fee award, and 2) as compensation for having undertaken the risk that the Administration and Monitoring Fund would not have sufficient funds to compensate Class Counsel for work performed in implementing and monitoring the Decree. In the event that the Court does not approve payment of the full amount to Class Counsel, the remaining amount shall be distributed to the class members on a pro rata basis, or, if it is less than $50,000, to charity. Consent Decree Section XXI(D)(5)(c).

Federal Rules of Civil Procedure).

IV. ARGUMENT

A. The Court Should Grant Preliminary Approval of the Class Action Settlement

To grant preliminary approval of this class action settlement, the Court must find only that the settlement is non-collusive and within "the range of possible approval." *Young v. Polo Retail, LLC*, 2006 WL 3050861 (N.D. Cal.); *see also In re Vitamins Antitrust Litig.*, 2001 WL 856292, *4-5 (D.D.C.); Newberg on Class Actions, Fourth Edition, §11.25.

1. The Terms of the Proposed Settlement Are Fair, Adequate and Reasonable.

As long as "preliminary evaluation of the proposed settlement does not disclose grounds to doubt its fairness or other obvious deficiencies, such as unduly preferential treatment of class representatives or of segments of the class, or excessive compensation for attorneys, and appears to fall within the range of possible approval," the Court should preliminarily approve the settlement. *In re Vitamins*, 2001 WL 856292 at *4-5 (quoting Manual for Complex Litigation, Third (FJC 1995)). The Court may also direct the giving of notice to the class members of a final approval hearing, "at which arguments and evidence may be presented in support of and in opposition to the settlement." *McNamara v Bre-X Minerals Ltd.*, 214 F.R.D. 424, 426 (E.D. Tex. 2002) (quoting Manual for Complex Litigation, Third, at 237); 4 Newberg §11.25 (quoting same).[3]

Here, the parties negotiated the proposed settlement in good faith and at arms' length. *See* Finberg Dec. ¶¶25-29. As noted above, discovery and informal exchanges of information in connection with the settlement mediation process, has allowed Class Counsel – who are experienced employment discrimination and class action attorneys – to assess the strengths and weaknesses of the claims against McCormick & Schmick's and the benefits of the proposed settlement under the circumstances of this case. *Id.*

Counsel for both sides have conducted a thorough investigation into the facts of the case

[3] The fourth edition of the Manual for Complex Litigation was released in 2004 and does not include this precise language, but instead suggests that if a court has "reservations" about any of the issues described, it should "raise questions . . . and perhaps seek and independent review . . ." Manual for Complex Litigation, Fourth, at 321. The end result is the same.

and have diligently investigated the class members' claims. Class Counsel believe the settlement is fair, reasonable, and adequate, achieves an excellent result for class members, and is in the best interest of the class in light of all known facts and circumstances, including the risk of significant delay and McCormick & Schmick's asserted defenses. *See id.* ¶¶35-36.

2. Class Counsel Were Fully Informed When the Settlement Was Reached.

As noted above, and as described in the Finberg Declaration ¶¶14-19, Class Counsel spent thousands of hours litigating this case and vigorously investigating the claims asserted against McCormick & Schmick's.

Class Counsel spoke with approximately 100 of the approximately 3000 class members, thoroughly interviewed two dozen of them, and analyzed information from those interviews, producing a total of 17 signed declarations. Plaintiffs also propounded document requests, and reviewed many thousands of pages of documents that were produced in discovery. Class counsel also reviewed and, with expert assistance, analyzed comprehensive work history and payroll data from 2002 through 2006. In addition to consulting with statistical experts, Class Counsel consulted with a labor economist. Finberg Dec., ¶17.

Class Counsel also deposed six persons designated as subject matter experts under Rule 30(b)(6) who testified on a variety of topics, including company operations, hiring practices, training, compensation policies, store openings, data collection, and others. Company deponents included the Director of Human Resources, the Director of Training, the Vice President of Operations, and others. Finberg Dec., ¶18.

Class Counsel also responded to discovery propounded by Defendants. Plaintiffs responded to a total of six sets of document requests and two sets of interrogatories, and produced several hundred pages of documents. In addition, Class Counsel defended depositions of named plaintiffs Juanita Wynne and Dante Byrd. Finberg Dec., ¶19.

Class Counsel used the extensive knowledge of McCormick & Schmick's practices that counsel gained through discovery as the basis for negotiations regarding the significant affirmative relief described above. *Id.* ¶¶27-28.

During discovery, Class Counsel also received information from McCormick &

Schmick's related to appropriate calculation of damages, including a detailed database of employment and payroll information. *See id*. ¶29. Using that data, Class Counsel's statistical experts performed promotions and compensation analyses and then a damages analysis. McCormick & Schmick's experts did the same, and the parties' expert damages calculations formed the basis for negotiations regarding the monetary terms of the settlement. *Id*.

In sum, Class Counsel completed substantial investigation and discovery and negotiated the proposed settlement with complete knowledge regarding the strengths and weaknesses of the case and the amounts necessary to compensate class members for the harm suffered.

3. Liability, Damages, and the Propriety of Class Certification Are all Contested. The Settlement Provides Reasonable Compensation for Class Members' Claims, in Light of the Delay and Risks Associated With Continued litigation.

Of particular relevance to the reasonableness of the proposed settlement is the fact that McCormick & Schmick's has and would continue to contest vigorously the merits of class members' claims. McCormick & Schmick's denies that it engaged in any intentional discrimination against African-American employees and denies that its employment practices had a disparate impact on African Americans. It is apparent from the proceedings to date and the Parties' mediation process that, were the litigation to continue, McCormick & Schmick's would aggressively contest the propriety of class certification and would contest liability. It would also argue that if liability were found, damages would be minimal.

McCormick & Schmick's arguments would include, without limitation, the following:

1. Class certification would be inappropriate because its operations are decentralized, and personnel decisions are made by individual managers at more than 60 restaurants nationwide, which would make trial of this action unmanageable.

2. Statistical analyses show no racial disparities in hiring or job assignment when compared to other restaurants in the appropriate local labor markets. Although plaintiffs disputed the validity of these analyses, and had their own analysis showing statistically significant disparities with respect to the placement of African Americans in front of the house positions, there was a substantial risk that a trier of fact would agree with the Company's

analyses.

3. McCormick & Schmick's hotly contensted that it had engaged in intentional discrimination, and plaintiffs bore a significant risk that they would not be able to persuade a jury that McCormick & Schmick's standard operating procedure was a pattern and practice of intentional discrimination.

4. McCormick & Schmick's maintains, and has statistical analyses supporting its view, that there are no differences between compensation of African American and White employees doing the same job. Again, Plaintiffs had their own analysis showing disparities, but were at risk that they could not persuade the trier of fact.

5. McCormick & Schmick's also contended that, even if liability were established, any damages were minimal. Plaintiff bore significant risk on this issue as well.

Such arguments notwithstanding, McCormick & Schmick's has concluded that it is in the Company's interest to resolve and settle this litigation pursuant to the proposed Consent Decree. For their part, Class Counsel have analyzed and evaluated the merits of Plaintiffs' claims made against McCormick & Schmick's in the Litigation and the impact of the proposed Consent Decree on Plaintiffs and the Settlement Class. Finberg Dec., ¶35. Specifically, while Plaintiffs' counsel believes that Plaintiffs' claims are meritorious and that Plaintiffs would eventually prevail in certifying this case as a class action and would prevail on the merits, Plaintiffs' counsel has also considered factors such as the substantial risks of continued litigation and the possibility that the case, if not settled now, might not result in any recovery or might result in a recovery several years from now that is less favorable to class members than that offered by the proposed Consent Decree. Finberg Dec., ¶¶35-36. In light of such considerations, Plaintiffs' counsel is satisfied that the terms and conditions of the Settlement are fair, reasonable and adequate and that the Settlement is in the best interests of the Class. *Id.*

4. The Settlement Is the Product of Serious, Arms' Length, Informed Negotiations.

The Settlement resulted only after extensive, arms' length settlement negotiations that were conducted after rigorous discovery regarding the merits and damages of the disputed

claims, and under the supervision of experienced mediator Hunter Hughes. *See id.* ¶¶25-26. The negotiations were protracted, and the mediation itself required multiple lengthy sessions. *See id.* In sum, the proposed settlement is the non-collusive product of hard-fought litigation.

5. The Proposed Plan of Allocation is Fair and Reasonable.

As described above, the proposed plan of allocation takes into account two factors to ensure that the ultimate division of the settlement proceeds among class members is fair and accurate, while at the same time preserving the intended efficiencies of class action litigation: length of service and type of job jeld, which takes into account the fact that those who served the longest in back of the house jobs have stronger potential claims and larger potential damages.

6. The Proposed Service Payment to the Class representative Is Reasonable.

The Settlement provides for a service payment of up to $5,000 for Class Representative Juanita Wynne. Ms. Wynne performed important services for the benefit of the Class. She provided information regarding the structure of the company and her job duties during lengthy interviews; she submitted to deposition by McCormick & Schmick's; she produced relevant documents; and she worked with Class Counsel throughout the case. *See* Finberg Dec., ¶¶20-21. "Courts routinely approve incentive awards to compensate named plaintiffs for the services they provided and the risks they incurred during the course of the class action litigation." *Ingram v. The Coca-Cola Co.*, 200 F.R.D. 685, 694 (N.D. Ga. 2001), *quoting In re S. Ohio Correctional Facility*, 175 F.R.D. 270, 272 (S.D. Ohio 1997)); *see also Van Vranken v. Atlantic Richfield Co.*, 901 F.Supp. 294, 300 (N.D. Cal. 1995) (approving $50,000 participation award). Plaintiffs will file a separate motion for approval of the service payment.

7. The Proposed Attorneys Fees are Fair and Reasonable.

The Consent Decree provides for payment to Class Counsel of $900,000, or such amount as is approved by the Court, for attorneys' fees and expenses spent litigating this matter through the Final Approval Date, in light of applicable fee-shifting statutes. That amount is approximately half of Class Counsel's lodestar for time and expenses actually spent litigating

this matter. Finberg Dec. ¶33. Class Counsel will file a separate motion for approval of attorneys' fees and expenses.

B. The Court Should Grant Provisional Certification of the Settlement Classes.

This Court has the power pursuant to F.R.C.P. 23 to "make a conditional determination of whether the action should be maintained as a class action, subject to approval at a later date." *Robert F Fry, Jr. v. Hayt, Hayt & Landau,* 198 F.R.D. 461, 466 (2000).

Plaintiffs seek approval of two provisional Settlement Classes:

An Injunctive Relief Class, certified pursuant to Rule 32(b)(3), defined in the Consent Decree to include "All African Americans employed by McCormick & Schmick's in Front of the House or Back of the House positions between May 15, 2002 and the date the Decree terminates;" (Consent Decree Section VI(A)) and

A Monetary Relief Class, certified pursuant to Rule 32(b)(2), defined to include "All African Americans employed by McCormick & Schmick's in Front of the House or Back of the House positions between May 15, 2002 and the Preliminary Approval Date, except those who file a timely request to opt out of the monetary relief provisions of the Decree." (Consent Decree Section VI(B))

The Consent Decree defines "Front of the House" positions as waiter, waitress, server, host, hostess, bartender, and cocktail server. Consent Decree Section III(O). "Back of the House" positions are all the other hourly (non-exempt) restaurant positions. Consent Decree Section III(C).

These classes sufficiently meet all the Rule 23 requirements for certification to warrant the Court's provisional certification. Fed. R. Civ. P. 23(a), 23(b)(2), 23(b)(3).

1. Numerosity.

The numerosity requirement is met if "the class is so large that joiner of all members is impracticable." Fed. R. Civ. P. 23(a)(1). McCormick & Schmick's employee and payroll files show that there are approximately 3,000 members of the Monetary Relief Class, which satisfies the numerosity requirement.

2. Commonality and Typicality.

A class meets the commonality prerequisite "if there are questions of fact and law which are common to the class." Fed. R. Civ. P. 23(a)(2). This rule is to be construed permissibly. "All questions of fact and law need not be common to satisfy the rule." *Hanlon v. Chrysler Corp.,* 150 F.3d 1011, 1019 (9th Cir. 1998). The typicality requirement is met if "the claims or defenses of the representative parties are typical of the claims or defenses of the class." Fed. R. Civ. P. 23(a)(3). Like commonality, the typicality requirement is construed liberally and is met if the class representatives have claims that are "reasonably co-extensive with those of absent class members." *Hanlon,* 150 F.3d at 1020. The members of the class share common issues of fact and law regarding (1) whether McCormick & Schmick's employment policies and practices were intentionally discriminatory and/or had an adverse impact on African Americans; and (2) whether Title VII or Section 1981 have been violated.

3. Adequacy of Representation.

Under Rule 23(a)(4), the representative parties must "fairly and adequately protect the interests of the class." To determine the adequacy of representation, a court must consider two questions: "(1) do the named plaintiffs and their counsel have any conflicts of interest with other class members and (2) will the named plaintiffs and their counsel prosecute the action vigorously on behalf of the class?" *Hanlon,* 150 F.3d at 1020 (citing *Lerwill v. Inflight Motion Pictures, Inc.,* 582 F.2d 507, 512 (9th Cir. 1978)). In this case, the Class Representative and Class Counsel have no conflicts with the class, and have provided excellent representation to the class throughout this litigation, including in obtaining a highly favorable settlement.

4. Rule 23(b)(2) and (3).

Finally, if all the requirements of Rule 23(a) are met, class certification is appropriate if the class also meets the requirements of Rule 23(b)(1), (2), or (3).

The injunctive relief class meets the requirements of Rule 23(b)(2), because McCormick & Schmick's 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). McCormick & Schmick's employment practices

and policies applied to all class members, and injunctive relief is appropriate with respect to all class members' claims.

The monetary relief class meets the requirements of Rule 23(b)(3) because common questions "predominate over any questions affecting only individual members," and class resolution is "superior to other available methods for the fair and efficient adjudication of the controversy." Fed. R. Civ. P. 23(b)(3). As set forth above, the common questions predominate, since the claims of the members of each class have the same legal and factual bases. The superiority of a class action in this case to a multiplicity of individual and duplicative proceedings is also readily apparent. If each plaintiff were required to litigate his or her case separately, the courts would be tasked with resolving thousands of individual cases, and McCormick & Schmick's with defending the same number of cases. Moreover, the cost of litigating the claims might deter some class members who have valid claims from pursuing them. The interests of the plaintiffs, defendant and the courts are therefore best served by resolving this matter on a classwide basis.

C. The Proposed Notice and Claims Process Are Appropriate.

1. The Proposed Class Notice Satisfies Due Process.

The content of the proposed Notice of Class Action Settlement, which is attached to the proposed preliminary approval order as Exhibit 2, fully complies with due process and FRCP 23. The Notice provides the definition of the Settlement Class, describes the nature of the action and claims, states that a member of the monetary relief settlement class may enter an appearance through counsel, explains the procedures for excluding oneself or objecting to the settlement, and explains the binding effect of the judgment on those who remain in the class. The Notice also describes the terms of the settlement, informs the class about the attorneys' fees terms of the agreement, and provides specific information regarding the date, time, and place of the final approval hearing.

The detailed information in the proposed Notice is more than adequate to put class members on notice of the proposed settlement. Courts have approved class notices even when they provided only general information about a settlement. *See, e.g.*, *In re Michael Milken &*

Assocs. Sec. Litig., 150 F.R.D. 57, 60 (S.D.N.Y. 1993) (class notice "need only describe the terms of the settlement generally"). The proposed Notice fully complies with the requirements of Rule 23(c)(2)(B) and due process.

2. The Notice Plan and Claims Process Are Appropriate.

The Consent Decree provides that the claims administrator will send the notice by U.S. mail to the last known address of each class member. McCormick & Schmick's will provide the claims administrator with names and contact information of potential Settlement Class members within 20 days of preliminary approval, and that list will be updated with any information available through the National Change of Address system. The claims administrator will send the notice to class members within 10 days of receiving class members' data from McCormick & Schmick's. The claims administrator will also trace all returned undeliverable notices and re-send them to the most recent addresses available. *See* Consent Decree Section XXII(C).

As discussed above, the notice to the class will contain information about how to exclude oneself, object to the settlement, and/or file a claim. Class members will have 60 days from the date of mailing to submit opt-out requests or to comment on or object to the settlement. This is sufficient time to give Settlement Class member a fair opportunity to respond. *Cf. Torrisi v. Tucson Elec. Power Co.*, 8 F.3d 1370, 1375 (9th Cir. 1993) (approving notice sent 31 days before the deadline for objections and 45 days before the hearing).[4] Class members will have 70 days from the mailing of Notice to submit a claim form. In doing so, they will be permitted to correct any of the pre-printed information of the claim form. Once clams are received, the claims administrator will send payments as soon as practicable via First Class Mail.

[4] McCormick & Schmick's shall have the unilateral right to revoke the Consent Decree prior to the Settlement Effective Date if five percent (5%) or more of the class members opt-out of the monetary relief provisions of the Consent Decree and do not rescind their opt-out statements. To exercise this option, the Company must inform Class Counsel that it will revoke the Consent Decree within 10 business days after the deadline for opt out statements. If McCormick & Schmick's exercises its unilateral right to revoke the Consent Decree, all monies in the Settlement Fund, and all income earned thereon, will be immediately returned to the entity that funded the Settlement Fund. *See* Consent Decree Section XXIII(C)(4).

D. The Court Should Set a Final Settlement Approval Schedule.

The last step in the settlement approval process is the formal hearing, at which the Court may hear all evidence and argument necessary to evaluate the settlement. The Parties propose the following schedule for final approval:

May 2, 2008	Last day for the claims administrator to mail Notice and Claim Form to class members. (30 days from April 3)
July 1, 2008	Objection postmark deadline (60 days from May 2)
July 1, 2008	Opt out statement postmark deadline (60 days from May 2)
July 11, 2008	Claim form submission postmark deadline (70 days from May 2)
June 26, 2008	Deadline for filing motions re: 1) final settlement approval; 2) service awards; and 3) attorneys' fees and expenses (35 days prior to Final Approval Hearing).
July 24, 2008	Reply papers due (7 days before Final Approval Hearing).
July 31, 2008 2:00 p.m.	Final approval hearing.

V. CONCLUSION

For all of the foregoing reasons, the plaintiff classes respectfully request that the Court: (1) preliminarily approve the parties' class action settlement and proposed Consent Decree, (2) provisionally certify the Settlement Classes, (3) approve and direct distribution of the class notice and claim form, and (4) set the foregoing schedule for the final approval process.

Dated: February 28, 2008

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