

On June 25, 2004, Plaintiffs brought the instant action (“litigation”) on behalf of

themselves and others similarly situated claiming that they and others were denied employment at Georgetown Place Community located at 1717 Maplecrest Road, Fort Wayne, Indiana owned by Merrill Gardens, L.L.C. (“Merrill Gardens”) and that the denial of employment was on the basis of race/color in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e *et seq.*, and §1981 of the Civil Rights Act of 1866, 42 U.S.C. §1981.

On January 4, 2005, the Equal Employment Opportunity Commission (“EEOC”) filed a “companion” suit against Merrill Gardens (the “EEOC Action”) under authority granted by Sections 706(f)(1) and (3) and 707 of Title VII of the Civil Rights Act of 1964 as amended, 42 U.S.C. §2000e-5(f)(1) and -6 (“Title VII”); and Section 102 of Title I of the Civil Rights Act of 1991, 42 U.S.C. §1981(a). The EEOC’s Complaint alleged that Merrill Gardens had a pattern and/or practice of refusing to hire non-Caucasians because of their race and/or color, in violation of Section 703(a) of Title VII, 42 U.S.C. §2000e-(2)(a); alleged that Merrill Gardens failed, in violation of Section of 709(c), 42 U.S.C. §2000e-8(c), to make and preserve records relevant to the determination of whether unlawful employment practices have been or were being committed; and sought appropriate relief for named Plaintiffs Caroline Aduro, Samantha Bolden, Jaela Brownlee, Debra Edwards, William Anthony Hill, Elizebeth Worthman, and a class of non-Caucasian individuals who were adversely affected by the alleged illegal hiring practices of Merrill Gardens.

On April 18, 2005, Plaintiffs, by counsel, the EEOC and Merrill Gardens participated in a Judicial Settlement Conference which resulted in settlement. The proposed Settlement Class satisfies all the requirements of Federal Rule of Civil Procedure 23. The proposed Settlement Class is unified by their common status as applicants for employment, either

known or unknown who applied, but were denied employment because of their race between February 17, 1998 and April 18, 2005. The proposed settlement achieved by the parties by way of the April 18, 2005 Judicial Settlement Conference is fair, adequate and reasonable in that cash compensation will be paid to qualifying settlement class members.

Notice will be published in newspapers of general circulation in the Fort Wayne area including the Fort Wayne Journal Gazette, News Sentinel and Frost Illustrated. Notice of class action, proposed settlement and fairness hearing will be sent to the putative members of the Settlement Class. Furthermore, notice will take place by way of radio advertisements in the Fort Wayne geographic area. Said Notices will notify putative class members of the deadline for filing objections to the proposed settlement, their ability to opt out, and the process for filing requests to appear at the Final Fairness Hearing which will be scheduled to permit all interested parties to have an opportunity to present arguments and evidence in support of or in opposition to the proposed settlement agreement.

B. Settlement Negotiations

After suit was filed by the Plaintiffs on June 25, 2004, in addition to participation in an EEOC sponsored mediation in the later part of 2004, the parties discussed various issues involving settlement including incorporating the Court's assistance in setting the matter for a Judicial Settlement Conference. On April 18, 2005, a Judicial Settlement Conference was conducted with Magistrate Roger B. Cosbey. Present at said settlement conference were counsel and representatives from Merrill Gardens, counsel from the EEOC, class counsel, and the individually named plaintiffs in both the instant litigation and the EEOC action. Meaningful settlement discussions were held and settlement was achieved, resulting in a fair and

reasonable settlement on behalf of the class.

C. Proposed Settlement Agreement

The named Plaintiffs now move this Court to certify a settlement class consisting of all persons in the Settlement Class as more specifically set forth and otherwise defined in the Settlement Agreement. Plaintiffs also hereby move this Court to preliminarily approve the proposed Settlement Agreement which sets forth, in detail, the terms and conditions of the settlement, approve Hill as Class Representative and John T. Menzie and Shane C. Mulholland as Class Counsel, approve and order Class Notice and schedule a Final Fairness Hearing.

II. DISCUSSION

A. The Proposed Settlement Class Should be Conditionally Certified

Under Rule 23 of the Federal Rules of Civil Procedure, the Court must find that the proposed class satisfies requirements of subdivisions (a) and (b). *Amchem Products Inc. v. Windsor*, 521 U.S. 591, 618 (1997). The Settlement Class proposed herein satisfies those requirements and is otherwise maintainable as a class action under Rule 23(b)(3).

The 7th Circuit sets out in summary fashion the requirements of Rule 23(a) in *Keele v. Wexler*, 149 F.3d 589, 594 (7th Cir. 1998):

Rule 23 of the Federal Rules of Civil Procedure recites four threshold requirements applicable to all federal-court-class actions: (1) numerosity (the class must be so large “that joinder of all members ins impracticable”); (2) Commonality (there must exist “questions of law or fact common to the class”); (3) Typicality (name of parties’ claims or defenses “are typical . . . of the class”); and, (4) adequacy of representation (the representative must be able to “fairly and adequately protect the

interest of the class”).

Keele, 149 F.3d at 594.

Because the commonality and typicality requirements are so closely related, those two elements will be analyzed together.

1) Numerosity is Satisfied

Rule 23 Requires that a class must be so numerous such that joinder of all members proves impracticable. *Swanson v. American Consumer Indus., Inc.*, 415 F.2d 1326 (7th Cir. 1969) (citing Rule 23(a)(1) (40 constitutes a sufficiently large group to satisfy Rule 23(a)).

The proposed settlement class satisfies the numerosity requirement. The settlement class consists of both known and unknown class members. Known class members consist of six (6) individual plaintiffs. Although the unknown class members are yet to be determined, it consists of all African American and other minorities who submitted applications for employment at Merrill Gardens between February 17, 1998 and April 18, 2005 for vacant positions who were denied employment - a number believed to be sufficient to satisfy the numerosity requirement of Rule 23(a).

3. Commonality and Typicality are Satisfied

The second prerequisite, commonality, calls for the presence of “questions of law or fact common to the class.” Fed. R. Civ. Pro. 23(a)(2). “A common nucleus of operative fact” is generally enough to satisfy the commonality requirement of Rule 23(a)(2).” *Rosario v. Livaditis*, 963 F.2d 1013, 1018 (7th Cir. 1992), cert. denied, 506 U.S. 1051, 1113 S.Ct. 972

(1993); *Keele v. Wexler*, 149 F.3d 594 (7th Cir. 1998); *Augelli v. Goggins & Lavintman, P.A.*, 1998 W.L. 842348 (N.D. Ill. 1998); see also *Patrykus v. Gomilla*, 121 F.R.D. 357, 361 (N.D. Ill. 1988) (finding requirement met where all class members had at least one element of their causes of action in common).

The commonality requirement has been described as follows:

Commonality does not require that all questions of fact or law be identical. Factual variations among class grievances does not defeat a finding of commonality. Rather, this requirement is satisfied as long as “the class claims arise out of the same legal or remedial theory.

Johns v. DeLeonardis, 145 F.R.D. 480, 483 (N.D. Ill. 1992). It is enough to satisfy commonality that there be a “common question . . . at the heart of the case . . .”

Hubler Chevrolet, Inc. v. General Motors Corp., 192 F.R.D. 574, 577 (S.D. Ind. 2000).

The typicality requirement is closely related because it is met if the named plaintiffs’ claims arise from the same practice or course of conduct that gives rise to the claims of other class members and where said claims are based on the same legal theory. *De La Fuente v. Stokely-Van Camp, Inc.*, 713 F.2d 225, 232 (7th Cir. 1983). The typicality requirement is designed to align the interest of the class and class representatives so that the latter will work to benefit the entire class through the pursuit of their own goals. In re *Prudential Ins. Co.*, 148 F.3d 283, 311 (3rd Cir. 1998).

Here, the questions of law and fact are common to the class and predominate over questions affecting any individual class member. All putative class members, know and

unknown, consist of African-American and/or other non-Caucasians who submitted applications for employment at Georgetown Place, located at 1717 Maplecrest Road, Fort Wayne, Indiana, operated by Merrill Gardens, L.L.C. between February 17, 1998 and April 18, 2005 for vacant positions who were denied employment for such vacant positions.

The common questions which satisfy the commonality requirement of Rule 23(a)(2) also satisfy the typicality requirement of Rule 23(a)(3). Here, the settlement class share the same allegations of discrimination; share the same basis claims for payment of damages as a result of the alleged discrimination; and all share the same interests in proving discrimination on behalf of Merrill Gardens. The proposed settlement class meets the typicality requirement of Rule 23(a)(3).

3. The Proposed Class Representatives Have Fairly and Adequately Protected the Interest of the Class

As set forth in Rule 23(a)(4), the representative parties must fairly and adequately protect the interest of the class. Fed. R. Civ. P. 23(a)(4). This requirement comprises of two elements, one related to the class representatives and the other to the class counsel. The class representatives must avoid antagonistic interest with their class members and class counsel must be qualified and experienced. *In re: Asbestos Litigation*, 90 F.3d 963, 977 (5th Cir. 1996) (requirement encompasses both class representatives and class counsel). A class representative is not an inadequate representative merely because the party will not bear responsibility or all, or even a large part of, the cost of the suit. *Rand v. Monsanto Corp.*, 926 F.2d 596 (7th Cir. 1991). The proposed class representative and class counsel satisfy both prongs of this prerequisite.

Although a court may refuse class certification when disparate interests are present within a class or where the named representatives have interests antagonistic to those of unnamed class members, see *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 119 S.Ct. 2295, 144 L.Ed.2d 715 (1999); *Stout v. J.D. Byrider*, 228 F.3d 709, 717-718 (6th Cir. 2000). This is not an issue here. The proposed class representative, like those of the class, applied for, but did not receive consideration for vacant positions at Merrill Gardens. The putative class representative has maintained sufficient knowledge and ability to protect the interests of the class and has accepted the responsibilities of class representative in acting to further the interests of the entire class in agreeing to serve as class representative. In doing so, the prospective class representative does not expect additional payments above and beyond those of his other known class members for his role as class representative.

Moreover, the undersigned should be appointed as class counsel. Generally, courts are to presume competency of class counsel in the absence of proof to the contrary by the defendant. See *Hubler Chevrolet, Inc. v. General Motors Corp.*, 193 F.R.D. 574, 578 (S.D. Ind. 2000). Moreover, the undersigned are experienced in the areas of labor and employment law and both have appeared before this Court in many such matters representing both plaintiffs and defendants. Class Counsel has the qualifications, skills and experience sufficient to adequately represent the interest of the Settlement Class in a competent fashion.

4. The Proposed Settlement Class Satisfies the Additional Requirements of Rule 23(b)

Rule 23(b) of the Federal Rules of Civil Procedure provides additional prerequisites for maintaining a class action once the requirements of subdivision (a) have been met. 5

MOORES FEDERAL PRACTICE §23.40-23-49 (Matthew Bender 3d ed.). Subdivision (b)(1) contains two subparts: (A) Permits a class suit when the prosecution of separate actions by or against individual members of the class would create a risk of “inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class.” The emphasis on this subpart is on protecting the party opposing the class from inconsistent or varying adjudications, and requires instead that the claims, with regard to the class, be litigated in one lawsuit. 5 MOORE’S FEDERAL PRACTICE §23.41 (Matthew Bender 3rd ed). The fact that one defendant may be found liable for damages to one claimant but not to others is not an “inconsistent or varying adjudication.” *Id.* Instead, the rule requires that the relief requested by the class members be incompatible if separate suits were brought . *Id.* Subdivision(b)(1)(B) permits class actions when the presentation of a separate action by or against individual members of the class would create a risk of “adjudications with respect to the individual members of the class which would as a practical matter be dispositive of the interest of the other members not parties to the adjudications or would substantially impair or impede their ability to protect their interest.” Fed. R. Civ. Pro. 23(b)(1)(B). Moreover, an action may proceed as a class action under Rule 23(b)(3) if the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members and that class action is the superior method for the fair and efficient adjudication of the controversy. Fed. R. Civ. Pro. 23(b)(3).

This action is ripe for class certification. All class members have potential causes of action against Merrill Gardens with the common thread that questions of law and fact are

common to each in that said questions of law or fact predominate over any other question which may affect individual class members. The proposed class is sufficiently cohesive to warrant adjudication by class representation. The Southern District of Indiana in *Hubler*, 193 F.R.D. at 580 described the “predominance” requirement as follows:

Predominance is met when one or more of the central issues in the action are common to the class and can be said to predominate . . . Satisfying this criterion “normally turns on the answer to one basis question: is there an essential factual link between all class members and the defendant for which the law provides a remedy?”

Hubler, 193 F.R.D. at 580.

Here, there exists essential factual links between the prospective class members. The common nucleus of operative facts include allegations that Merrill Gardens intentionally discriminated against applicants of color. As a result, potential class members were denied employment for vacant positions. All members of the putative settlement class suffered damage by Merrill Gardens’ common course of conduct such that class certification is appropriate.

Moreover, class action is the superior method in which to ensure the fair and efficient adjudication of the instant controversy. See Fed. R. Civ. Pro. 23(b)(3). As stated *supra*, the claims settled here arise from the same core of operative facts resulting in the same or similar harm to all class members. The proposed settlement will ensure that the class members claims will proceed in an efficient manner resulting in a fair resolution when compared with the potential of multiple actions stemming from the common and predominate facts.

B. The Proposed Settlement is Fair, Adequate and Reasonable

When reviewing a settlement in a class action, a court must determine whether it is fair, adequate, and reasonable. 5 MOORE'S FEDERAL PRACTICE, §23.85 (Matthew Bender, 3rd ed.); *D'Amato v. Deutsche Bank*, 236 F.3d 78, 86-87 (2nd Cir. 2001) (settlement was fair, adequate, and reasonable when amount of relief was appropriate in light of risks of litigation and compromise was reached as a result of arm's length negotiations); *Dunleavy v. Nadler*, 213 F.3d 454, 458, 460 (9th Cir. 2000) (affirming approval of settlement as fair and adequate given among other factors, difficulty of proving case and the amount offered in settlement); *Thomas v. Albright*, 139 F.3d 227, 231-233 (D.C. Cir. 1998) (approving settlement when relief provided to class as a whole was fair, adequate, and reasonable, even if certain individuals might have been able to obtain more in individual suits).

Approval of class action settlements is a two-step process. First, courts are to make a preliminary evaluation of the fairness of the settlement. Where the proposed settlement appears to be the product of serious, informed, noncollusive negotiations in which the class members' claims were fairly and vigorously advocated, and where the proposed settlement has no obvious deficiencies, does not improperly grant preferential treatment to class representatives or segments, and falls within the range of possible approval, preliminary approval should be granted. See *Donovan v. Estate of Fitzsimmons*, 778 F.2d 298 (7th Cir. 1985); MANUAL FOR COMPLEX LITIGATION, 3RD SECTION 30.41.

Once preliminary approval is granted, the second step requires notice of a hearing to be given to class members at which time class members and settling parties may be heard in support of or in opposition to the settlement. MANUAL FOR COMPLEX LITIGATION, 3RD SECTION 30.41. The notice must inform the class members of the binding nature of the

litigation, the right to opt out of the binding effect of the judgment, and the opportunity to enter the action through an appearance of personal counsel. 5 MOORE'S FEDERAL PRACTICE, §23.62, 23.63 (Matthew Bender, 3rd ed.); *Phillips Petroleum Company v. Shutts*, 472 U.S. 797, 812, 105 S.Ct. 2965, 86 L.Ed. 2d 628 (1985) (due process requires at minimum that absent class members be provided with opportunity to opt out of class).

The district court may properly retain jurisdiction to ensure compliance with the settlement agreement entered and such retention of jurisdiction is consistent with the court's responsibilities under Rule 23 to protect the interest of the class members. *Alexander v. Chicago Park District*, 927 F.2d 1014 (7th Cir. 1991). The 7th Circuit clearly recognizes the authority of district courts to retain jurisdiction over settlement agreements they have entered and such power is enhanced when a court is attempting to protect members of a class action. *Id.*

The proposed settlement agreement is the product of extensive, meaningful arm's-length negotiations between qualified experienced counsel on behalf of Merrill Gardens, the EEOC, and Class Counsel. There has been no collusion in negotiating the proposed settlement agreement. In fact, settlement was reached with the assistance of this Court by way of a Judicial Settlement Conference which was held on April 18, 2005 lasting some 13 plus hours. The proposed settlement agreement does not favor the class representatives or any segment of the settlement class.

The provisions of the settlement agreement was the subject of significant negotiations resulting in favorable terms for both parties, but at the same time reflect mutual concessions. Counsel for the Merrill Gardens, EEOC and Class Counsel believe that the proposed

settlement is fair and reasonable in light of the circumstances as reflected by the Consent Decree and related documents. See *Isby v. Bayh*, 75 F.3d 1191, 1199 (7th Cir. 1996) (the district court was entitled to give consideration to the opinion of competent counsel that the settlement was fair, reasonable, and adequate.) These factors, when considered in their totality, show that the settlement reached at the Judicial Settlement Conference and further memorialized in the Settlement Agreement is fair, reasonable and adequate and should, therefore, be approved.

C. Class Notice Should be Approved

The notice must inform the class member of the binding nature of the litigation, the right to opt out of the binding effect of the judgment, and the opportunity to enter the action through an appearance of personal counsel. 5 MOORE'S FEDERAL PRACTICE §23.62, 23.63 (Matthew Bender, 3rd ed.); *Phillips Petroleum Company v. Shutts*, 472 U.S. 797 (1985). A notice of class settlement pursuant to Rule 23(e) of the Federal Rules of Civil Procedure must describe the settlement sufficiently to offer class members an opportunity to present objections. *In re: Agent Orange Product Liability Litigation*, 597 F.Supp 740, 759 (E.D. N.Y. 1984) *aff'd* 818 F.2d 145 (2nd Cir.). The notice of class settlement need not necessarily attach a copy of the settlement agreement provided a general description of the settlement terms and conditions contained therein. *Id.* Said notice must state the options open to dissenting class members and must be mailed out in a reasonable time in order to permit class members to investigate and reflect upon the matters before taking a position. *Id.* Copies of the proposed notices have been previously submitted to this Court for review. These notices comply with the

requirements discussed above, and therefore, should be approved as presented.

D. Final Fairness Hearing Should Be Scheduled

Plaintiffs further request that a Final Fairness Hearing be scheduled to give all interested parties an opportunity to comment on the proposed settlement and decide any objections from Merrill Gardens concerning the makeup of the settlement class as more specifically set forth in Section 403 of the Proposed Consent Decree. At said Fairness Hearing, arguments and evidence may be presented in support of and in opposition to the settlement. The hearing will provide a forum to those who object and for this Court to gather any and all necessary information to rule on whether the proposed settlement agreement is fair, reasonable and adequate and further decide, to the extent necessary, what individuals will be included in the class. Plaintiffs request that the Court schedule the hearing no sooner than thirty (30) days after notices are sent to all known and unknown putative class members.

III. CONCLUSION

For the reasons as more specifically outlined above, Plaintiffs' request that this Court:

- (1) Conditionally certify the settlement class;
- (2) Approve class representatives and appoint class counsel;
- (3) Preliminarily approve settlement;
- (4) Order class notice to be given; and
- (5) Schedule a Final Fairness Hearing at a date and time convenient for this Court and all parties hereto.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that a copy of the above and foregoing Memorandum was served on the following by CM/ECF, U.S. Mail, First Class Postage prepaid, Courthouse Mail or Hand Delivery on this 20th day of May, 2005:

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