IN THE UNITED STATES DISTRICT COURT
DISTRICT OF MARYLAND
SOUTHERN DIVISION

John O'Bannon, et al., Plaintiffs, v. Friedman's, Inc. Defendant.	Case No. AW-03-623 **PLAINTIFFS' NOTICE OF MOTION AND MOTION FOR PRELIMINARY APPROVAL OF CONSENT DECREE, CONDITIONAL CERTIFICATION OF SETTLEMENT CLASS, APPOINTMENT OF CLASS COUNSEL, DESIGNATION OF CLASS REPRESENTATIVES, APPROVAL OF CLASS NOTICE, AND SCHEDULING OF FINAL FAIRNESS HEARING; AND MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION**

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NOTICE OF MOTION AND MOTION

Plaintiffs respectfully move the Court for an order certifying a settlement class, preliminarily approving the Consent Decree (including the award of individual and class monetary relief, attorneys' fees and costs), designating Plaintiffs John O'Bannon, Ronald Hampton, and Sandra Moore as Class Representatives, appointing Plaintiffs' attorneys as counsel for the class, approving class notice, and setting a final Rule 23(e) hearing. In support of their motion, Plaintiffs rely upon this motion, the accompanying declarations of Morris J. Baller and Hon. Edward Panelli, the exhibits submitted with this motion, and any further arguments of counsel at the hearing on this motion. Defendants Friedman's, Inc. ("Friedman's"), and Federal Insurance Company ("Federal") do not oppose this motion.

RELIEF SOUGHT

Plaintiffs request that this Court: (1) grant Plaintiffs' motion for preliminary approval of the Consent Decree, including an award of individual and class monetary relief, notice and administration costs (of which $232,250 is for Plaintiffs' litigation costs, $286,250 is for Plaintiffs' attorneys' fees, and approximately $80,000 is for notice and administration costs); (2) certify a settlement class for equitable relief pursuant to Fed. R. Civ. P. ("Rule") 23(b)(2) and for monetary relief pursuant to Rule 23(b) (3); (3) appoint Plaintiffs' attorneys to serve as counsel for the class under Rule 23(g); (4) approve the proposed notice for mailing to the class, together with dates and procedures for class members to opt out of or object to the settlement, as specified in the notice; and (5) and set a final fairness hearing, as the Court's calendar permits, for the week of February 9, 2009, or as soon thereafter as possible.

MEMORANDUM OF POINTS AND AUTHORITIES

I. PRELIMINARY STATEMENT

Plaintiffs seek certification of a settlement class and preliminary approval of a settlement that will provide equitable and monetary relief to a class of African American current and former employees of Friedman's. Final approval of the settlement will resolve Plaintiffs' allegations that Friedman's engaged in a nationwide policy, pattern, or practice of racial discrimination in

promotions, compensation, store assignments, and other terms, conditions and privileges of employment, in violation of 42 U.S.C. § 1981, as amended ("Section 1981"),[1] before its discharge from bankruptcy.[2]

Counsel for Plaintiffs, Friedman's, and Federal (the "parties") have agreed to the proposed Consent Decree submitted with this motion (attached hereto as Exhibit 1) as a full and complete settlement of the action.[3] The proposed Consent Decree identifies the settlement class, for purposes of equitable and compensatory monetary relief as:

A. All African American employees who are or were employed by the Company in any retail store or in the store Field Organization, for any length of time, between March 6, 1999 and December 9, 2005; and

B. All African American applicants who applied for employment at the Company in any retail store or in the store Field Organization between March 6, 1999 and December 9, 2005, who were not hired on such application.

The portion of the Settlement Class that is eligible to seek to participate in the compensatory damages component of the monetary relief provided in the proposed Consent Decree consist of:

1. All African American employees who were employed by Friedman's in any retail store or in the store Field Organization who were employed in a full-time position for at least six

[1] This settlement would also resolve Plaintiffs' potential, but not yet filed, Title VII claims. *See* footnote 3, *infra*.

[2] Friedman's first filed for bankruptcy protection on January 14, 2005 and was discharged from that bankruptcy on December 9, 2005.

[3] In connection with the proposed Consent Decree, the potential claims of the Equal Employment Opportunity Commission ("EEOC"), which found cause on the plaintiffs', and other charging parties', Charges of Discrimination, and which could potentially have sued Friedman's under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, et seq., has also terminated its proceedings by the issuance of Notices of Right to Sue to each of the Plaintiffs and Charging Parties on August 27, 2008. The 90-day right to sue period on those notices will expire on or about November 26, 2008. Plaintiffs and Charging Parties have promised, of course, not to sue on those Notices. *See* Declaration of Morris J. Baller, filed herewith ("Baller Decl."), ¶ 40.

full consecutive months, between March 6, 1999 and December 9, 2005, except those who file a timely request to opt out of and be excluded from the compensatory damages component of the monetary relief provisions of the Consent Decree; and

2. All African American applicants who applied for employment at Friedman's in any retail store or in the store Field Organization between March 6, 1999 and December 9, 2005, who were not hired on such application, except those who file a timely request to opt out and be excluded from the compensatory damages component of the monetary relief provisions of the Consent Decree.

The proposed Consent Decree provides for recovery of $1,150,000 plus interest accruing on that amount until payout, for monetary relief for plaintiffs, class members, the expenses of notice and administration of the settlement, and plaintiffs' litigation expenses and attorneys' fees.[4]

The litigation as it has developed presented severe and intractable difficulties for Plaintiffs, most of them arising out of Friedman's unexpected bankruptcy after the filing of the complaint and the severely limiting conditions upon which Plaintiffs' claims were preserved from discharge when Friedman's emerged from bankruptcy. The achievement of significant and beneficial relief for the class in these circumstances is worthy of note and warrants approval of the proposed settlement.

[4] The monetary relief will accrue interest from the week after preliminary approval until it is disbursed, for the purpose of providing individual monetary awards to Plaintiffs and other eligible members of the settlement class, and paying notice and administration expenses and Plaintiffs' attorneys' fees and costs. (Consent Decree § VIII.) Of this amount, $203,500 will be paid to the named Plaintiffs and 22 other Charging Parties and persons who provided declarations relied on by the Plaintiffs in negotiating a settlement of the case; $518,500 will be allocated to payment of Plaintiffs' attorneys' fees and costs, *see* subsection III.3 below, and approximately $80,000 will be used to pay for administration of the settlement fund and publication and mailing of the class notice. (*Id.* § XI.B.1-2, 4-5.) The remainder of the settlement fund, amounting to approximately $350,000 (the "net settlement fund") will be distributed to eligible members of the settlement class who file timely claims for monetary recovery. (*Id.* § VII.B.) Plaintiffs anticipate that many hundreds of class members will recover hundreds of dollars each. (*See* Baller Decl., ¶ 43.)

The Consent Decree is based on discovery and exchanges of information, and is the product of arm's length negotiations in which the parties were represented by experienced and competent counsel, treats class members fairly, provides for payment of reasonable attorneys' fees and expenses, and easily falls within the range of possible approval. In addition, the proposed settlement class satisfies the class certification requirements of Rule 23, including numerosity, commonality, typicality, and adequacy of representation under Rule 23(a); maintainability under Rule 23(b)(2) for equitable relief; and predominance of common issues and superiority under Rule 23(b)(3) for compensatory damages. Therefore, Plaintiffs respectfully request that the Court preliminarily approve the Consent Decree, including payment of Plaintiffs' attorneys' fees and costs, pursuant to Rule 23(h), certify a settlement class pursuant to Rule 23, designate Plaintiffs John O'Bannon, Ronald Hampton and Sandra Moore as Class Representatives, appoint Plaintiffs' counsel as class counsel, approve the proposed notice (attached hereto as Exhibit 2), and set a fairness hearing pursuant to Rule 23(e).

II. FACTUAL BACKGROUND[5]

The class representative plaintiffs, all African Americans, are a rejected applicant for, and two employees in, covered store management positions with Friedman's.[6] They filed the complaint on March 26, 2003, alleging a pattern of intentionally discriminatory employment practices of Friedman's against African American employees and applicants. Plaintiffs seek to represent a class of both applicants for, and employees in, store positions between a date four years prior to filing of the complaint (based on the applicable statute of limitations for §1981

[5] The relevant prior proceedings have been summarized in pleadings and documented in declarations and exhibits filed on a number of prior motions in this case. Therefore, in the interest of brevity, in this Memorandum, Plaintiffs will not detail, but only highlight, the relevant background, and will omit citations of the special evidence that substantiates this summary. Those citations and that evidence are, however, in the record.

[6] The additional plaintiff, Rondall Mitchell, is a white former manager of Friedman's who witnessed, and was subjected to, racist instructions by higher-level Friedman's management to restrict and limit the employment opportunities of African American applicants and employees in store staff and management positions. He is not a class representative.

claims), and December 9, 2005, when Friedman's emerged from bankruptcy. No motion for class certification was filed in this case.

In 2003, Plaintiffs and Friedman's agreed to, and did, conduct initial discovery, then engaged in more extensive informal information exchanges with an eye to early settlement. These efforts, assisted by mediator John Bates of JAMS at a series of three mediation conferences in January through April 2004, resulted in a tentative settlement including extensive injunctive relief of the type outlined above, plus $9,325,000 in monetary relief (Declaration of Morris J. Baller in Support of Plaintiffs' Motion for Preliminary Approval of Consent Decree ("Baller Decl."), filed herewith, ¶ 17.) Of that monetary amount, Friedman's, which was by then already teetering on the edge of bankruptcy, was to pay $1,525,000, while its insurers were to pay $7,800,000. (*Id.*) The monetary portion of the settlement was, however, contingent on acceptance and funding by Friedman's insurers, who although they participated in the mediations ultimately declined to approve the settlement. (*Id.*)

Friedman's rapidly unraveled. On January 14, 2005, it filed a voluntary petition for relief under Chapter 11 of the Bankruptcy Code in the United States District Court for the Southern District of Georgia. This filing triggered an automatic stay of this case and deprived Plaintiffs of the ability to continue litigating it. Friedman's continued to operate its business as debtor-in-possession. Plaintiffs and their counsel filed Proofs of Claim in the bankruptcy proceedings, but Friedman's at all times during those proceedings possessed the ability to rescind the contractual agreements it had made for injunctive relief, and to discharge all claims for monetary relief made by Plaintiffs on behalf of themselves and the class. In these difficult circumstances, Plaintiffs successfully obtained a stipulated order of the Bankruptcy Court, entered on November 8, 2005, which permitted them to continue prosecution of the action in this Court on the condition that plaintiffs could not recover any monetary relief from Friedman's, but only from any available proceeds of its applicable insurance policies. An additional provision of that order required Plaintiffs to indemnify Friedman's for any costs it incurred in participating in the litigation, as specified in language that later came under dispute between the parties. Shortly thereafter, the

parties spent a long day in mediation of the claims before Hon. Erwin Katz (Ret.) of the U.S. Bankruptcy Court for the Northern District of Illinois, in November 2005; the mediation failed to produce a settlement. With these severe limitations on Plaintiffs' right to proceed, the stay was dissolved at about the same time that Friedman's emerged from bankruptcy as a reorganized company.

Friedman's insurers had disputed coverage under all but one of the potentially applicable policies. The one policy, a "wasting policy" on which a defense was tendered, had a $5 million limit of coverage, but had already been substantially used in the defense of other covered claims and defense of the present action, and continued to be consumed as the litigation continued. It soon became clear to all parties that if this litigation ran its course the entire policy limits amount would be used for defense costs, and no insurance proceeds would remain available for payment of any eventual judgment, unless Friedman's other policies were determined to be available.

Friedman's at first pursued its coverage dispute with its carriers by demanding arbitration of the coverage issues. However, when arbitration discovery and proceedings heated up in the months immediately before the scheduled arbitration hearing, Friedman's elected to drop its arbitration claim entirely in January 2006. This left Plaintiffs to attempt to assert Friedman's interest in the disputed policies as well as to litigate their own substantive discrimination claims.

Plaintiffs undertook substantial, expensive, and time-consuming motions and discovery in pursuit of the increasingly complex claims that they had to make in order to have any chance of monetary recovery. Plaintiffs successfully moved to compel responses to discovery (Order granted September 7, 2006). They also successfully moved to amend the complaint to add Friedman's two insurers as defendants (Order granted June 28, 2006, over Defendants' opposition). Then Plaintiffs successfully withstood the insurance company Defendants' respective motions to dismiss (Order entered April 30, 2007) and obtained a stay of proceedings on the discrimination claims while they litigated the insurance coverage claims (Order entered April 11, 2007). Meanwhile, ruling on a dispute growing out of discovery in the resumed action, the Court interpreted the Bankruptcy Court's Order dissolving the litigation stay as requiring

Plaintiffs to bear Friedman's litigation costs, at least for discovery initiated by Plaintiffs, and ordered Plaintiffs to reimburse Friedman's for certain reasonable costs incurred in the case (Order entered March 3, 2007). Plaintiffs' counsel, the putative Class Counsel, eventually paid Friedman's defense counsel's firm over $ 20,000 for just its first invoice pursuant to this Order. The Court further ordered the parties to file cross-motions for summary judgment, which were filed but not heard before the presently proposed settlement was reached. Throughout this process, the amount of funds remaining available on the single insurance policy on which a defense had been tendered to Friedman's has continued to dwindle.

Against this forbidding litigation background, Plaintiffs mediated their claims with Friedman's and Federal Insurance Company on October 16, 2007, under the auspices of JAMS. Hon. Edward Panelli (Ret.), of the California Court of Appeal and Supreme Court, served as the mediator. As a result of that mediation session, counsel for Plaintiffs, Friedman's and Federal agreed to a full monetary settlement of all individual and class claims in the amount of $1,150,000 to be funded solely by the one Federal policy which has been providing the costs of Friedman's defense. It was agreed that the settlement was to be consummated by a Consent Decree incorporating the earlier Partial Settlement Agreement on the injunctive relief and the above-stated monetary settlement.

On January 22, 2008 – as the parties neared completion of the settlement papers – some of Friedman's creditors filed a petition to declare it bankrupt in the United States Bankruptcy Court in Delaware (Bankruptcy Petition No. 08-10161-CSS). Notice of this bankruptcy petition and the automatic stay resulting thereby was given to the United States District Court in Maryland on February 1, 2008. As a result of this petition and subsequent proceedings in the Bankruptcy Court, the petition has been converted to a Chapter 7 proceeding and Friedman's is in the process of liquidation. Given these dire circumstances, the non-monetary injunctive relief set forth in the Partial Settlement Agreement, which was to be incorporated in the Consent Decree originally agreed to by the parties, is now rendered moot and no longer able to be effectuated.

On July 8, 2008, the Bankruptcy Court entered an order lifting the stay to permit the parties to submit this Consent Decree to the District Court and to consummate their settlement of this Civil Action upon the terms set forth herein.

Plaintiffs request that the Court initiate the settlement approval process by granting preliminary approval of the proposed Consent Decree, including payment of Plaintiffs' attorneys' fees and costs; certifying a settlement class for equitable relief pursuant to Rule 23(b)(2) and compensatory damages pursuant to Rule 23(b)(3); appointing Plaintiffs' attorneys as counsel for the class; approving and authorizing the sending to class members of the notice submitted herewith; and setting a Rule 23(e) final fairness hearing.

III. THE PROPOSED SETTLEMENT SATISFIES ALL OF THE REQUIREMENTS FOR PRELIMINARY APPROVAL UNDER RULE 23(e).

A. Legal Standard for Preliminary Approval.

Rule 23(e)(1)(C) requires court approval of a class action settlement after the court determines that it is fair, reasonable, and adequate. Federal courts, including courts in the Fourth Circuit, recognize "'an overriding public interest in favor of settlement'" of class action litigation. *South Carolina Nat'l Bank v. Stone*, 749 F. Supp. 1419, 1423 (D. S.C., 1990) (quoting *Armstrong v. Bd. of Sch. Dirs.*, 616 F. 2d 305, 312-13 (7th Cir. 1980)); *see also In re Serzone Products Liab. Litig.*, 231 F.R.D. 221, 241 (S.D.W.Va. 2005) ("compromise and settlement are favored by the law"). Likewise, the Fourth Circuit requires a district court to bear in mind "the clearly expressed intent of [Title VII] to encourage settlements" when reviewing a proposed employment discrimination class action settlement. *Flinn v. FMC Corp.*, 528 F. 2d 1169, 1174 (4th Cir. 1975), *cert. denied*, 424 U.S. 967 (1976).

The *Manual for Complex Litigation* describes the procedure for judicial review and approval of proposed class action settlements:

> Approval of class action settlements involves a two-step process. First, counsel submit the proposed terms of settlement and the court makes a preliminary fairness evaluation. In some cases this initial evaluation can be made on the basis of information already known to the court,

> supplemented as necessary by briefs, motions, or informal presentations by the settling parties. . . . If the 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 direct that notice under Rule 23(e) be given to the class members of a formal fairness hearing, at which arguments and evidence may be presented in support of and in opposition to the settlement.

Manual for Complex Litigation, Third (Fed. Jud. Center 1995) § 30.41. This two-step procedure has been specifically embraced by this Court. *See In re Mid-Atlantic Toyota Antitrust Litig.*, 564 F. Supp. 1379, 1384 (D. Md. 1983); *Grice v. PNC Mortgage Corp. of Am.*, No. CIV. A. PJM-97-3084, 1998 WL 350581 (D. Md. May 21, 1998).

At this first stage of the process, the Court does not determine, as a final matter, whether the proposed Consent Decree should be approved, but only engages in a preliminary assessment of the fairness and adequacy of the proposed terms of settlement. *In re Mid-Atlantic*, 564 F. Supp. at 1384. This preliminary analysis examines the elements of "fairness" and "adequacy" separately. *Id.* at 1383. The Court's determination at this stage is simply whether "there is, in effect, 'probable cause' to submit the proposal to members of the class and hold a full-scale hearing on its fairness, at which all interested parties will have an opportunity to be heard and after which a formal finding on the fairness of the proposal will be made." *Id.* at 1384.

As more fully explained below, the Court should preliminarily approve the proposed Consent Decree because "probable cause" exists that: (1) it is fair as a result of arm's length negotiations by experienced, qualified attorneys after substantial discovery and litigation, and (2) it is adequate because it provides substantial equitable and monetary relief, awards fair and reasonable attorneys' fees, and avoids the risk of delay and protracted litigation.

B. <u>The Proposed Consent Decree is Fair Because it is the Result of Arm's Length Negotiations By Experienced Class Counsel After Substantial Discovery and Exchange of Information.</u>

The Court must consider the following factors in evaluating the fairness of a proposed class action settlement: (1) the posture of the case; (2) the extent of discovery conducted; (3) the

circumstances surrounding the negotiations; and (4) the experience of counsel. *In re Jiffy Lube Sec. Litig.*, 927 F. 2d 155, 158-59 (4th Cir. 1991); *Flinn*, 528 F. 2d at 1173. The Court's task at this juncture is to determine that "probable cause exists that the Settlement was arrived at in an appropriate manner." *In re Mid-Atlantic*, 564 F. Supp. at 1385.

Such a finding is warranted here based on application of the four fairness factors. The posture of the case and the discovery and informal exchanges of statistical and other information by the parties has afforded experienced class counsel a more than adequate opportunity to evaluate its strengths and weaknesses. Plaintiffs engaged in extensive efforts to resolve this matter through litigation and mediation since March 2003, including overcoming motions to dismiss, filing cross-motions for summary judgment, participating in Friedman's bankruptcy proceedings, and arbitrating and litigating insurance coverage claims that were not contemplated at the outset of the action. Plaintiffs' counsel undertook an extensive investigation of the class claims. They obtained and reviewed thousands of pages of documents about Friedman's store positions, personnel policies and practices, and workforce employment and compensation data; interviewed dozens of putative class members and other witnesses with information relevant to the claims; drafted declarations, conducted discovery, and retained expert witnesses to analyze Friedman's' statistical workforce data; retained bankruptcy counsel to guide them through the Bankruptcy Court proceedings, and worked to preserve Plaintiffs' and the Class members' claims through those proceedings; reviewed numerous Friedman's insurance policies and researched applicable insurance coverage law; and continued to litigate Plaintiffs' and the Class Members' claims vigorously throughout this lengthy and difficult case.

The circumstances surrounding settlement negotiations also weigh in favor of a preliminary finding of fairness. Plaintiffs' decision to settle the case at this juncture is informed by the severe, if not unprecedented, difficulties in their litigation situation, all of which flow in one way or another from Friedman's bankruptcy and the conditions on dissolution of the litigation stay and avoidance of the discharge of all claims that would otherwise have accompanied it. Plaintiffs' counsel participated in at least four separate days of in-person

mediation plus numerous other days of negotiations of injunctive and monetary relief provisions with defense counsel over a period of several years. (Baller Decl., ¶¶ 19-23) The ultimate settlement resulted from intensive negotiations supervised by a renowned and highly experienced mediator. (Baller Decl., ¶ 17; see also Declaration of Hon. Edward A. Panelli (Ret.) ("Panelli Decl."), ¶¶ 3-8.)

Finally, the experience of counsel weighs in favor of the proposed settlement's fairness. The proposed Consent Decree is the result of extensive, informed, arm's length negotiations by attorneys with substantial litigation and trial experience, who are fully familiar with the legal and factual issues of this case, and who have experience in litigation and settlement of complex and/or class action employment discrimination cases. *See* Baller Decl., ¶¶ 28-32; Panelli Decl., ¶¶ 3-8. Plaintiffs' counsel informed opinion is that the proposed Consent Decree is fair, adequate, and reasonable. (Baller Decl., ¶ 45.)

Accordingly, the posture of the case, extent of discovery, circumstances surrounding settlement negotiations, and experience of counsel warrant a preliminary determination of fairness.

C. The Proposed Consent Decree is Adequate Because it Provides Substantial Relief and Avoids the Risk of Delay and Protracted Litigation.

The Court's assessment of the Consent Decree's adequacy should consider the class recovery in light of the following factors: (1) the relative strength of plaintiffs' case and probability for success at trial; (2) the anticipated duration and expense of additional litigation; (3) the solvency of defendants and likelihood of recovery on a litigated judgment; and (4) the degree of any opposition to the settlement. *See Grice*, 1998 WL 350581 at *6 (citing *In re Mid-Atlantic*, 564 F. Supp. at 1384). The proposed relief should fall within "the range of 'possible approval'" when weighed against these factors. *See In re Mid-Atlantic*, 564 F. Supp. at 1385.

The proposed Consent Decree provides equitable and compensatory monetary relief that is fair and reasonable under the difficult circumstances of this case, and further supports the Court's preliminarily approval of the proposed Consent Decree. The relief achieved by Plaintiffs

in the Decree includes compensation for class members who are or were subject to the practices and policies Plaintiffs allege are unlawful, from a settlement fund in the amount of $1,150,000 available to those class members who submit a claim of having been the victims of racial discrimination by Friedman's.[7] The Consent Decree also requires Friedman's to pay Plaintiffs' counsel, out of that fund, attorneys' fees, litigation expenses, and costs in the amount of approximately $518,500 for work performed and costs and expenses incurred through the date of final approval of the Decree.[8]

The proposed relief falls well within the range of possible approval when weighed against the first three adequacy factors (the probability of success, duration and expense of additional litigation, and solvency of defendant).[9] While Plaintiffs believe their case on the merits is theoretically strong, continued litigation would present potentially insurmountable practical barriers to recovery. Lying ahead, before Plaintiffs could hope for any monetary recovery, were the following hurdles: (1) to win Plaintiffs' two motions for summary judgment on the insurance coverage issues; or at least (2) to defeat Defendants' two motions for summary judgment on those issues and then prevail at a trial on the coverage issues; (3) to sustain their hoped-for victory on coverage issues on an interlocutory appeal that the insurance company defendants would make, which on the procedural efficiency logic previously urged by Plaintiffs

[7] Those equitable and monetary relief terms, which are summarized in section I. above, will not be repeated here.

[8] Included in this amount is approximately $235,250 for litigation costs and expenses incurred by Plaintiffs' counsel, leaving only approximately $286,250 for attorneys' fees. (*Id*. § VIII.) This amount of fees is little more than 10% of the value of the time expended by Class Counsel on the case, at their usual hourly billing rates. (Baller Decl., ¶ 37.) Such an amount is fair and reasonable in light of the substantial discovery, litigation, and mediation tasks undertaken by Class Counsel to prosecute and resolve Plaintiffs' claims, as detailed in section II. Pursuant to Rule 23(h), Plaintiffs will include a request for approval of the final award of their fees and costs, including all legal fees and expenses in connection with counsel's prosecution of this litigation for review by the Court, at the Final Fairness Hearing.

[9] The fourth factor, the degree of opposition to the settlement, is not as relevant at the preliminary approval stage because class members have not yet been given notice of the proposed Consent Decree. At this stage, the named plaintiffs' support of the settlement weighs in favor of preliminary approval.

and adopted by the Court would be procedurally appropriate; (4) to obtain class certification of the employment discrimination claims, which Friedman's has consistently promised to vigorously, and expensively, defend against; (5) to win on the merits of the discrimination case at trial; (6) to obtain affirmance of a trial court judgment on appeal to the Fourth Circuit, which all Defendants have also promised; and (7) to complete with success any necessary remand proceedings and subsequent appeals. (See Baller Decl., ¶ 44.) By the end of this process, there would to a certainty be no money left in the single tendered policy, and much of the other policies' funds – the availability of which was hotly contested as a matter of insurance coverage law – would also, if available at all, have been spent in defense costs.

The proposed settlement, on the other hand, makes equitable and monetary relief available to class members in a prompt and efficient manner. The benefits of the Decree's substantial recovery, when balanced against the risks and delay of protracted litigation, weigh heavily in favor of the reasonableness of the proposed settlement. It bears repeating that, in the absence of a settlement, the arduous, years-long course of litigation that would ensue would almost certainly exhaust both Plaintiffs' and Friedman's available financial resources and make any monetary recovery improbable.

IV. CERTIFICATION OF THE SETTLEMENT CLASS PURSUANT TO RULE 23(a), (b)(2) AND (b)(3) IS PROPER.

The proposed Consent Decree provides for certification of a settlement class pursuant to Rule 23(a), (b)(2), and (b)(3). The practice in the Fourth Circuit is to "give Rule 23 a liberal rather than restrictive construction, adopting a standard of flexibility in application [that] will in the particular case best serve the ends of justice for affected parties and . . . promote judicial efficienc[ies]." *Gunnells v. Healthplan Servs. Inc.*, 348 F. 3d 417, 424 (4th Cir. 2003) (quotation omitted). Certification of a settlement-only class is routine and proper in circumstances such as these. *See, e.g., Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 618 (1997) ("the 'settlement only' class has become a stock device"). In addition, the Decree provides for notice to the class and the right of class members to opt out of the monetary settlement. The proposed Decree

contemplates that class members who opt out will still be bound by the class injunctive relief provisions of the Decree, but will not be eligible to participate in, or be bound by, the class monetary relief provisions. Thus, individual class members who wish to pursue their own monetary claims will be able to do so.

A. Certification is Appropriate Under Rule 23(a).

In determining if class certification is appropriate, a court must first look to Rule 23(a). The putative class in question easily meets the standards set forth in Rule 23(a) for numerosity, commonality, typicality, and adequacy of class representation.

1. Numerosity

Under Rule 23(a)(1), the class must be "so numerous that joinder of all members is impracticable." Rule 23(a)(1). Generally, fewer than 20 employees will not satisfy numerosity, while more than 40 will. *Newsome v. Up-To-Date Laundry, Inc.*, 219 F.R.D. 356, 360-61 (D. Md. 2004). In addition to numbers, geographic diversity tends to establish the impracticability of joinder. *See Grice*, 1998 WL 350581 (class members residing in four states).

Joinder would be impracticable, and numerosity thus satisfied, here because of the size and geographic diversity of the class. The parties estimate that Friedman's employed approximately 4,000 African Americans in the covered store positions from the beginning of the class period in March 1999 through the date of its discharge from bankruptcy in December 2005. (Baller Decl., ¶ 41.) These class members worked for Friedman's in approximately 20 states. (*Id.*) Thus, the proposed class meets the numerosity requirement even considering only employee class members, as joinder of all putative class members would be impracticable. There are in addition an unknown, but no doubt large number (in the thousands) of members of the applicant class.

2. Commonality

Rule 23(a)(2) requires questions of law or fact common to the class. "The commonality requirement is relatively easy to satisfy, and very few cases have been dismissed for failing to meet it." *Buchanan v. Consolidated Stores Corp.*, 217 F.R.D. 178, 187 (D. Md. 2003).

"Commonality does not require class members to share *all* issues in the suit, but simply a single common issue." *Id.* (emphasis in the original). Thus, factual differences among the class members will not preclude certification if they share the same legal theory. *Id.* at 188. In the discrimination context, this Court has focused its inquiry on whether the claims involve the employer's centralized decisionmaking. *Id.* at 187 (citing *Hewlett v. Premier Salons Int'l, Inc.*, 185 F.R.D. 211, 215 (D. Md. 1997)).

Here, Plaintiffs allege that Friedman's engaged in a policy and/or pattern or practice of race-based discrimination against African American employees with regard to hiring, compensation and promotions in covered store positions. The disputed practices occurred within the framework of a companywide set of policies, procedures, and practices – in particular, a policy of intentionally limiting employment and advancement of African Americans that emanated from upper executive management ranks and that affected all class members and in all stores and regions.[10] Thus, Plaintiffs' class claims arise from centralized decisionmaking and do not depend on the terms of employment circumstances or particular claims of individual class members. Thus, the commonality requirement is satisfied here.

3. Typicality

Rule 23(a)(3) requires the Court to determine whether the claims of the representative parties are typical of the claims of the class. Typicality is satisfied where the named plaintiffs' claims rest on the same legal theory and arise "from the same event or practice. . . that gives rise to the claims of the other class members." *Buchanan*, 217 F.R.D. at 187-88.

Here, the Class Representatives collectively worked in several of the store positions at issue, and in that capacity were affected by Friedman's allegedly discriminatory hiring practices, in different states and regions of the company; and all of them allege that they were subject to intentionally discriminatory practices.[11] They allege that the conduct they challenge was not

[10] *See* Amended Complaint (Dkt. 62) ¶¶ 14-21.

[11] *See* Amended Complaint ¶¶ 22-54.

unique to them, and other class members were subjected to the same course of conduct. The EEOC, in its determinations of cause on all four of the Plaintiffs' charges, credited those allegations both as to them individually and as to the class. Plaintiffs thus satisfy the typicality requirement.

4. Adequacy of Representation

The adequacy of representation requirement of Rule 23(a)(4) mandates that the court look to whether the named plaintiffs "will fairly and adequately protect the interests of the class." Named plaintiffs are deemed an adequate class representative if: (1) their counsel are qualified, experienced, and capable of conducting the litigation, and (2) their interests do not conflict with the class. *Newsome*, 219 F.R.D. at 362-63; *Hewlett*, 185 F.R.D. at 218 (D. Md. 1997).

Plaintiffs and their counsel have tenaciously pursued this litigation in the interests of the class. They have engaged in discovery, motion practice, and settlement negotiations for over four years, in increasingly difficult circumstances. Plaintiffs are represented by experienced counsel with a proven track record of success in employment discrimination and class action litigation.[12] The named Plaintiffs and proposed Class Representatives have cooperated with their counsel in prosecuting this action by providing information to support the allegations, and participating as necessary in the proceedings. Moreover, no conflicts of interest exist between the named Plaintiffs and proposed Class Representatives and the class members.

Accordingly, the Court should find that the proposed Class Representatives and their counsel have satisfied the adequacy of representation requirements Rule 23(a)(3).

B. Hybrid Certification Under Rule 23(b)(2) and (b)(3) is Appropriate to Protect Class Members Who Wish to Assert Individual Monetary Relief.

In addition to meeting the requirements of Rule 23(a), a class action must also satisfy the requirements of at least one of the subdivisions of Rule 23(b). *See Amchem Products, Inc.*, 521

[12] *See* Baller Decl., ¶¶ 28-32. The declaration of counsel submitted herewith provides the Court with sufficient information to appoint Plaintiffs' counsel as Class Counsel under Rule 23(g). *See id.* and factors listed in Rule 23(g)(1)(C)(i).

U.S. at 614. Here, Plaintiffs seek to have the classes certified for equitable monetary relief under Rule 23(b)(2) and for compensatory damages under Rule 23(b)(3).

Where, as here, a class action involving allegations of a pattern and practice of racial discrimination that involves both equitable and monetary relief, courts have specifically recognized the availability of "hybrid certification" – certification of the equitable aspects of the case under Rule 23(b)(2) and the damages aspects under Rule 23(b)(3). *See Miller v. Baltimore Gas & Elec. Co.*, 202 F.R.D. 195, 199-200 (D. Md. 2001) (citing *Jefferson v. Ingersoll Int'l., Inc.,* 195 F.3d 894, 899-900 (7th Cir. 1999), *Lemon v. Int'l. Union of Operating Eng'rs.*, 216 F.3d 577 (7th Cir. 2000), *Eubanks v. Billington*, 110 F.3d 87, 96 (D.C. Cir. 1997), and *Diaz v. Hillsborough County Hosp. Auth.*, 165 F.R.D. 689, 695 (M.D. Fla. 1996)). Under these authorities, a claim for damages does not preclude class certification, although it may require that such claims be certified under Rule 23(b)(3) and notice and opt-out procedures be used to protect class members who wish to assert individual monetary relief. *See Jefferson*, 198 F.3d at 898; *Lemon*, 216 F.3d at 580-82. The proposed Consent Decree meets these requirements.

1. Rule 23(b)(2) Treatment is Appropriate for Equitable Relief.

Class certification is appropriate under Rule 23(b)(2) where defendant "acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief. . . ." The propriety of Rule 23(b)(2) certification for suits challenging discriminatory policies, and thereby requiring systemic relief, has been widely acknowledged throughout the Fourth Circuit. *See Chisholm v. U.S. Postal Serv.*, 665 F. 2d 482, 492 (4th Cir. 1981); *Hewlett*, 185 F.R.D. at 222; *Hubbard v. Rubbermaid, Inc.*, 78 F.R.D. 631, 644 (D. Md. 1978); *see also Amchem Products, Inc.*, 521 U.S. at 614 ("[c]ivil rights cases against parties charged with unlawful, class-based discrimination are prime examples" of Rule 23(b)(2) class actions). Back pay, including lost wages, is considered equitable relief and can therefore be awarded in a case certified under Rule 23(b)(2). *See Albermarle Paper Co. v. Moody*, 422 U.S. 405, 416-17 (1975); *Robinson v. Lorillard Corp.*, 444 F. 2d 791, 802 (4th Cir. 1971).

The Rule 23(b)(2) requirement that the action be appropriate for equitable relief applicable to the class as a whole is plainly met here. The parties had completed negotiations on injunctive relief provisions that were to have been included in the final Consent Decree, when Friedman's second bankruptcy and the conversion of that case to a liquidation proceeding made injunctive relief moot. The injunctive relief agreed to was comprehensive, detailed and far-reaching, and addressed each of the practices Plaintiffs alleged were responsible for racial disparities in hiring, promotions, and compensation. The Consent Decree in its final form requires payment of lost wages, in the form of back pay, to class members. Such back pay is an equitable remedy, not a form of damages available at law. *Curtis v. Loether*, 415 U.S. 189, 197 (1974); *see* 42 U.S.C. § 2000e-5(g).

2. Rule 23(b)(3) Treatment is Appropriate for Monetary Relief.

Class certification is appropriate under Rule 23(b)(3) where "common issues predominate over individual claims" and where "class certification is a superior method of resolving the controversy." *Newsome*, 219 F.R.D. at 365. Claims for monetary relief are subject to certification under Rule 23(b)(3). *Miller*, 202 F.R.D. at 198.

The "predominance" requirement is met when liability "turns on common employer practices rather than individual employee reactions." *Newsome*, 219 F.R.D. at 365. Here, common issues predominate because the Plaintiffs' claims implicate systemic policies and practices implemented uniformly throughout Friedman's, which the Consent Decree addresses on a classwide basis through monetary (as well as equitable) relief.

A class action is also superior to other methods of adjudication of this case. Judicial economy and consistent judgments would be achieved through certification of the class. The alternative would be the filing of additional cases and piecemeal litigation. *See In re Serzone*, 231 F.R.D. at 240. Classwide litigation and settlement of these claims are clearly superior to the alternative of thousands of separate lawsuits in that such class treatment will save judicial resources and preclude inconsistent judgments by various courts. *See id.* Furthermore, the Consent Decree's notice and opt-out procedures will assure fairness and due process to class

members who wish to assert separate individual claims for monetary relief. Accordingly, the compensatory damages claims are eminently suitable for certification under Rule 23(b)(3).

V. THE PROPOSED CLASS ACTION SETTLEMENT NOTICE PROCEDURE SATISFIES DUE PROCESS AND RULE 23(c) AND (e).

To satisfy due process, notice of a proposed class action settlement 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." *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 (1985) (quotation omitted); *see also Grice*, 1998 WL 350581 at *8. Under Rule 23(c)(2)(B), class members are entitled to the "best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." Additionally, Rule 23(e) mandates that notice of a compromise of a class action must "be given to all members of the class in such manner as the court directs."

The notice procedure proposed by the parties provides for a mutually selected third party Settlement Administrator to mail the proposed notice, in the form attached as Exhibit 2 to this motion, to all class members of the employee class via first class U.S. Mail to their last known addresses as obtained from Friedman's' personnel records and updated by the Settlement Administrator through search of a national change of address database.[13]

In addition, the parties propose to give notice to the applicant class, consisting of rejected or unsuccessful job applicants during the Class Period, by publication, since Friedman's has not retained application records sufficient to identify the members of that class or their addresses. That notice will be given by publication in a weekday edition of USA Today, in the form attached as Exhibit 3 to this motion. Based on the extensive experience of Class Counsel and the

[13] The parties as part of the settlement the services of an experienced and well qualified settlement administrator, Settlement Services, Inc. of Tallahassee, Florida to prepare and mail the notice of settlement and notice of individual monetary awards to the class members. (Baller Decl. ¶ 27.) Settlement Services, Inc.'s principal, Thomas A. Warren, is one of the Class Counsel.

Settlement Administrator chosen for this action, this is the most cost-effective and reliable way of giving notice to such a class of persons who cannot be individually identified from company records. (Baller Decl., ¶ 27.)

Rule 23(c)(2)(B) requires that the notice state, in plain, easily understood language: the nature of the action, the class definition, class claims, class members' right to be heard pro se or through counsel, class members' right to opt out, and the binding effect of a class judgment. The proposed notices attached to this motion include all of this information in plain and clear language, and also include: a summary of the terms of the Consent Decree, including the procedures by which monetary relief will be distributed to all eligible class members who do not opt out; deadlines and procedure for objecting or opting out, and rescinding an opt out; the date, time and location of the final fairness hearing;[14] the names and addresses of counsel for the parties; and an invitation to class members to contact the Settlement Administrator or Plaintiffs' counsel with any questions regarding the settlement; and the number for a toll-free 800 telephone line so that class members may ask any questions they may have.[15]

In sum, the notice provisions more than adequately meet Rule 23 and due process requirements and should be approved by the Court.

VI. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that this Court grant Plaintiffs' motion for preliminary approval of the proposed Consent Decree, including an award of Plaintiffs' attorneys' fees and costs; certify a settlement class for equitable monetary relief pursuant to Rule 23(b)(2) and for compensatory monetary relief pursuant to Rule 23(b)(3);

[14] For the Court's convenience, a summary of the proposed schedule for class members to file opt-out statements, rescissions, and objections, and for the final approval and payout of the settlement, is attached as Exhibit 4 to this motion.

[15] Because of the high and size-determined cost of nationally published notice, and the likelihood that a shorter notice is more likely to be read by the intended recipients than a longer, more complex notice would be, the notice proposed for the applicant class is less detailed than the notice to be mailed to members of the employee class.

designate Plaintiffs O'Bannon, Hampton and Moore as Class Representatives; appoint Plaintiffs' counsel to serve as counsel to the class under Rule 23(g); approve the proposed notice for mailing to the class; and set a final fairness hearing, as the Court's calendar permits, on or soon after February 9, 2008. A proposed Order is submitted herewith.[16]

Dated: September 25, 2008 Respectfully Submitted,

/s/

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ATTORNEYS FOR PLAINTIFFS AND THE CLASS

[16] That Order specifies that the Final Approval hearing be held more than a month after the end of the 90 day period in which plaintiffs could – but will not – file a Title VII action based on their EEOC-issued right to sue letters. Plaintiffs understand and agree that, if any of them or other charging parties represented by plaintiffs' counsel were to file such an action, contrary to their agreement in settling this case, the Court should and would deny final approval.