

1 James M. Finberg (SBN 114850)
Eve H. Cervantez (SBN 164709)
2 Rebekah B. Evenson (SBN 207825)
ALTSHULER BERZON LLP
3 177 Post Street, Suite 300
San Francisco, CA 94108
4 Telephone: (415) 421-7151
Facsimile: (415) 362-8064
5 E-Mail: jfinberg@altshulerberzon.com
E-Mail: ecervantez@altshulerberzon.com
6 E-Mail: revenson@altshulerberzon.com

7 Kelly M. Dermody (SBN 171716)
Jahan C. Sagafi (SBN 224887)
8 LIEFF, CABRASER, HEIMANN &
BERNSTEIN, LLP
9 275 Battery Street, 30th Floor
San Francisco, CA 94111-3339
10 Telephone: (415) 956-1000
Facsimile: (415) 956-1008
11 E-Mail: kdermody@lchb.com
E-Mail: jsagafi@lchb.com

12 Attorneys for Plaintiffs and proposed Classes
13 *Additional Counsel Listed on Signature Page of*
14 *Motion for Preliminary Settlement Approval*

15 UNITED STATES DISTRICT COURT
16 NORTHERN DISTRICT OF CALIFORNIA
17 OAKLAND DIVISION

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

21 Plaintiffs,

22 v.

23 MCCORMICK & SCHMICK'S
24 SEAFOOD RESTAURANTS, INC. and
25 MCCORMICK & SCHMICK
26 RESTAURANT CORP.,

27 Defendants.

Case No. C-06-3153 CW

REVISED 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

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

1 Having reviewed Plaintiffs' Motion for an Order (1) Preliminarily Approving Class
2 Action Settlement and Proposed Consent Decree; (2) Provisionally Certifying Settlement
3 Classes; (3) Approving and Directing Distribution of Notice of the Settlement; and (4) Setting a
4 Schedule for the Final Settlement Approval Process, the Memorandum of Points and Authorities
5 in support thereof, the Declaration of James M. Finberg in support thereof, the proposed Consent
6 Decree, Notice and Claim Form, and the arguments of counsel, along with the files and records
7 of this case, the Court now FINDS, CONCLUDES, and ORDERS as follows:

8 **I. PROVISIONAL CERTIFICATION OF SETTLEMENT CLASSES**

9 A. For settlement purposes, the Parties have proposed provisional certification of the
10 following settlement classes (terms defined in the proposed Consent Decree attached hereto as
11 Exhibit 1):

12 1. For purposes of the injunctive and declaratory relief provided in the
13 Decree, an injunctive-relief settlement class certified under Federal Rules of Civil Procedure
14 23(a) and 23(b)(2) and consisting of "All African Americans employed by McCormick &
15 Schmick's in Front of the House or Back of the House positions between May 15, 2002 and the
16 date the Decree terminates;" ("Front of the House" is defined in Section Section III(O) of the
17 Decree; "Back of the House" is defined in Section III (C) of the Decree).

18 2. For purposes of the monetary relief provided in the Decree, a monetary
19 relief settlement class certified under Federal Rules of Civil Procedure 23(a) and 23(b)(3) and
20 consisting of: "All African Americans employed by McCormick & Schmick's in Front of the
21 House or Back of the House positions between May 15, 2002 and the date of the entry of this
22 order, except those who file a timely request to opt out of the monetary relief provisions of the
23 Decree."

24 B. The injunctive relief and monetary relief settlement classes allege claims for race
25 discrimination brought under the Civil Rights Act of 1964 (both disparate impact and disparate
26 treatment), and 42 U.S.C. § 1981, and those class members who worked in California during the
27 class period allege violations of the California Fair Employment and Housing Act.

28 C. The Court hereby provisionally FINDS and CONCLUDES that the injunctive relief

1 settlement class set forth above satisfies all of the requirements for certification under Rule 23(a)
2 and Rule 23(b)(2). The class is sufficiently numerous (approximately 3,000 persons) that joinder
3 is impracticable. The members of the class share common issues of fact and law regarding (1)
4 whether McCormick & Schmick's employment policies and practices were intentionally
5 discriminatory and/or had an adverse impact on African Americans; and (2) whether Title VII or
6 Section 1981 have been violated. Juanita Wynne's claims are typical of those of the class she
7 represents because they arise out of the same policies, practices and course of conduct alleged on
8 behalf of all class members. Juanita Wynne is an adequate representative of the class she
9 represents, because her interests are co-extensive with those of class members, and she has
10 retained experienced counsel to represent the class. Plaintiffs are seeking meaningful
11 declaratory and injunctive relief applicable to the class as a whole. Accordingly, the Court
12 hereby provisionally CERTIFIES the injunctive-relief settlement class under Rule 23(a) and
13 Rule 23(b)(2).

14 D. The Court also hereby provisionally FINDS and CONCLUDES that the monetary
15 relief settlement class described above satisfies all of the requirements for certification under
16 Rule 23(a) and Rule 23(b)(2). As discussed in Paragraph 3, above, the requirements of Rule
17 23(a) - numerosity, commonality, typicality, and adequacy appear to be satisfied. In addition,
18 the Court provisionally concludes that the monetary relief settlement class satisfies the
19 requirements for certification under Rule 23(b)(3). Questions of law or fact common to the class
20 predominate over individualized issues, and a class action is superior to other available methods
21 for the fair and efficient adjudication of the controversy. Because certification of the monetary
22 relief settlement class is proposed in the context of a settlement, the Court need not inquire
23 whether the case, if tried as a class action, would present intractable management problems.
24 Accordingly, the Court provisionally CERTIFIES the monetary-relief settlement class as set
25 forth above, under Rules 23(a) and 23(b)(3).

26 **II. APPOINTMENT OF CLASS REPRESENTATIVES AND CLASS COUNSEL**

27 A. The Court finds that Class Representative Juanita Wynne has claims typical of class
28 members and is an adequate representative of the class members. The Court appoints her to

1 serve as Class Representatives of both the injunctive relief and monetary relief classes.

2 B. The Court finds that Altshuler Berzon LLP; Lieff, Cabraser, Heimann & Bernstein,
3 LLP; the Lawyers' Committee for Civil Rights of the San Francisco Bay Area; Thomas A.
4 Warren Law Offices; Lewis, Feinberg, Lee, Renaker & Jackson, P.C.; and Kingsley &
5 Kingsley have extensive experience and expertise in prosecuting employment discrimination
6 class action cases. The Court appoints these firms as Class Counsel for both the injunctive relief
7 and monetary relief classes.

8 **III. PRELIMINARY APPROVAL OF CONSENT DECREE**

9 A. The Court has reviewed the terms of the [Proposed] Consent Decree attached as
10 Exhibit 1, including specifically the injunctive relief provisions and the plan of allocation. The
11 Court also reviewed the Motion papers and the declaration of James M. Finberg, which describe
12 Class Counsel's legal and factual investigation, and the settlement mediation process. Based on
13 review of those papers, and the Court's familiarity with this case, the Court concludes that the
14 settlement and Consent Decree are the result of extensive, arms' length negotiations between the
15 Parties after Class Counsel had investigated the class claims and became familiar with the
16 strengths and weakness of plaintiffs' case. The assistance of an experienced mediator in the
17 settlement process confirms that the settlement is non-collusive. Based on that review, and the
18 Court's familiarity with the issues in the case, the Court concludes that the proposed Consent
19 Decree has no obvious defects and is within the range of possible settlement approval, such that
20 notice to the Class is appropriate.

21 B. It is therefore ORDERED that:

22 1. The [Proposed] Consent Decree and the settlement it embodies are hereby
23 PRELIMINARILY APPROVED. Final approval and entry of the Consent Decree is subject to
24 the hearing of any objections of members of the Settlement Class to the proposed settlement
25 embodied in the Consent Decree.

26 2. Pending determination of the fairness of the Consent Decree, all further
27 litigation of this action is hereby STAYED.

28

1 **IV. APPROVAL OF THE FORM AND MANNER OF DISTRIBUTING CLASS**
2 **NOTICE AND CLAIM FORM**

3 A. The Parties have also submitted for this Court's approval a proposed Class Notice and
4 a proposed Claim Form, which the Court has carefully reviewed. The Court finds and concludes
5 as follows:

6 1. The proposed Class Notice is the best notice practical under the
7 circumstances and allows Class Members a full and fair opportunity to consider the proposed
8 Settlement. The proposed plan for distributing the Class Notice and Claim Form, which are
9 attached as Exhibits 2 and 3 hereto, likewise is a reasonable method calculated to reach all
10 members of the Class who would be bound by the Settlement. Under this plan, the Claims
11 Administrator will distribute the Class Notice and Claim Form to Class Members, all of whom
12 are current or former employees of the Company, by first class U.S. Mail to their last known
13 addresses, as updated by the USPS NCOA service. There is no additional method of distribution
14 that would be reasonably likely to notify Class Members who may not receive notice pursuant to
15 the proposed distribution plan.

16 2. The Class Notice fairly, plainly, accurately, and reasonably informs Class
17 Members of: (1) the nature of this litigation, the settlement class, the identity of Class Counsel,
18 and the essential terms of the Settlement and Decree, including injunctive relief and the plan of
19 allocation; (2) Class Counsel's forthcoming application for attorneys' fees, the proposed service
20 payments to the Class Representative, and other payments that will be deducted from the
21 settlement fund; (3) how to participate in the Settlement; (4) this Court's procedures for final
22 approval of the Settlement Agreement and Settlement, and about class members' right to appear
23 through counsel if they desire; (5) how to challenge or opt-out of the Settlement, if they wish to
24 do so; and (6) how to obtain additional information regarding this litigation, the Settlement, and
25 the Decree.

26 3. Similarly, the proposed Notice and Claim Form allow members of the
27 Settlement Classes a full and fair opportunity to submit a claim for proceeds in connection with
28 the Settlement. The Notice and Claim Form fairly, accurately, and reasonably inform Settlement

1 Class Members that failure to complete and submit a Claim Form, in the manner and time
2 specified, shall constitute a waiver of any right to obtain any share of the settlement payment.

3 4. The Court FINDS and CONCLUDES that the proposed plan for
4 distributing the Notice and Claim Form (“Notice Materials”) will provide the best notice
5 practicable, satisfies the notice requirements of Rule 23(e), and satisfies all other legal and due
6 process requirements.

7 5. Accordingly, the Court hereby ORDERS as follows:

8 a. The form of the Notice Materials is approved.

9 b. The manner of distributing the Notice Materials is approved.

10 c. Promptly following the entry of this Order, the Claims Administrator
11 shall prepare final versions of the Notice Materials, incorporating into the Notice the relevant
12 dates and deadlines set forth in this Order.

13 d. Within twenty days following entry of this order, McCormick &
14 Schmick’s shall provide the Claims Administrator with computer readable information, in a
15 format acceptable to the Claims Administrator, that contains the full names, social security
16 numbers, last known addresses, position(s) held during the class period, and start dates and any
17 applicable end dates of employment for each position held with McCormick & Schmick’s from
18 May 15, 2002 to the date of the entry of this order of all persons who are potential Settlement
19 Class members.

20 e. Prior to the mailing of the Notice Materials, the Claims
21 Administrator will update any new address information for potential class members as may be
22 available through the National Change of Address (“NCOA”) system.

23 f. Within ten (10) days of the date that the Claims Administrator
24 receives the data described in paragraph (d), above, the Claims Administrator shall mail the
25 Notice Materials, via first class mail, to all known potential settlement class members at their last
26 known address or the most recent address that may have been obtained through the NCOA. The
27 Claims Administrator will trace all returned undeliverable notices and re-mail them to the most
28 recent address available.

1 g. The Claims Administrator shall take all reasonable steps to obtain
2 the correct address of any Class Members for whom the notice is returned by the post office as
3 undeliverable, and otherwise to provide the Notice Materials to such persons. The Claims
4 Administrator shall notify Class Counsel of any mail sent to Class Members that is returned as
5 undeliverable after the first mailing as well as any such mail returned as undeliverable after any
6 subsequent mailing(s).

7 h. The Claims Administrator shall take all other actions in
8 furtherance of claims administration as are specified in the Decree.

9 **V. PROCEDURES FOR FINAL APPROVAL OF THE SETTLEMENT**

10 A. Fairness Hearing

11 The Court hereby schedules a hearing to determine whether to grant final certification of
12 the Settlement Classes, and final approval of the Consent Decree (including the proposed plan of
13 allocation, injunctive relief, payment of attorneys' fees and costs, and service payments to the
14 Class Representatives) (the "Fairness Hearing"), for **August 7, 2008 at 2:00 p.m.**

15 B. Deadline to Request Exclusion from the Settlement

16 1. Class members may exclude themselves from, or opt-out of, of the
17 monetary relief provisions of the class settlement. Any request for exclusion must be in the form
18 of a written "opt-out" statement sent to the Claims Administrator. A person wishing to opt-out
19 must sign a statement which includes the following language:

20 I understand that I am requesting to be excluded from the class monetary
21 settlement and that I will receive no money from the settlement fund created
22 under the Consent Decree entered into by McCormick & Schmick's. I understand
23 that if I am excluded from the class monetary settlement, I may bring a separate
24 legal action seeking damages, but may receive nothing or less than what I would
have received if I had filed a claim under the class monetary settlement procedure
in this case. I also understand that I may not seek exclusion from the class for
injunctive relief and that I am bound by the injunctive provisions of the Consent
Decree entered into by McCormick & Schmick's.

25 2. To be effective, any opt-out statement must be sent to the Claims
26 Administrator postmarked no later than 60 days after the date that the Claims Administrator first
27 mails the Class Notice to the Class. Only those class members who request exclusion in the time
28 and manner set forth herein shall be excluded from the class for monetary relief purposes.

1 Pursuant to Federal Rules of Civil Procedure 23(b)(3) and (c)(2), the terms and provisions of the
2 Consent Decree concerning monetary relief shall have no binding effect on any person who
3 makes a timely request for exclusion in the manner required by this Order.

4 3. The Claims Administrator shall stamp the date received on the original of
5 any opt-out statement and serve copies on Class Counsel and counsel for McCormick &
6 Schmick's no later than two business days after receipt of such statement. Class Counsel will
7 file the date-stamped originals with the Clerk of the Court no later than five (5) business days
8 prior to the date of the Fairness Hearing

9 4. Class members shall be permitted to withdraw or rescind their opt-out
10 statements by submitting a "rescission of opt-out" statement to the Claims Administrator. The
11 rescission of opt-out statement shall include the following language:

12 I previously submitted an Opt-out statement seeking exclusion from the class
13 monetary settlement. I have reconsidered and wish to withdraw my Opt-out
14 statement. I understand that by rescinding my Opt-out I may be eligible to
15 receive an award from the claims settlement fund and may not bring a separate
16 legal action against McCormick & Schmick's seeking damages with respect to the
17 Released Claims. I further understand that in order to receive an award from the
18 claims settlement fund, I must submit a complete and timely claim form.

19 To be effective, any opt-out rescission statement must be sent to the Claims Administrator
20 postmarked no later than the deadline for the claims filing period specified herein.

21 5. The Claims Administrator shall stamp the date received on the original of
22 any rescission of opt-out statement and serve copies on Class Counsel and counsel for
23 McCormick & Schmick's no later than two business days after receipt of such statement. Class
24 Counsel will file the date-stamped originals with the Clerk of the Court no later than five (5)
25 business days prior to the date of the Fairness Hearing.

26 C. Defendant's Right to Rescind Agreement

27 McCormick & Schmick's shall have the unilateral right to revoke the Consent Decree
28 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 of the deadline for postmarking opt out statements.

1 In the event that McCormick & Schmick's exercises its unilateral right to revoke the Consent
2 Decree pursuant to this section, all monies in the Settlement Fund, and all income earned
3 thereon, shall be immediately returned to the entity that funded the Settlement Fund.

4 D. Deadline for Filing Objections to Settlement and [Proposed] Consent Decree

5 Class members objecting to the terms of the settlement must do so in writing. To be
6 effective, any objection must be sent to the Claims Administrator postmarked no later than 60
7 days after the date that the Claims Administrator first mails the Class Notice to the Class. The
8 Claims Administrator will record the date of receipt of the objection and forward it to both
9 McCormick & Schmick's and Class Counsel within two (2) business days following receipt.

10 Class Counsel will file the original objections with the Clerk of the Court no later than
11 ten (10) days prior to the scheduled Fairness Hearing date. The Claims Administrator shall
12 retain copies of all written objections until such time as it has completed its duties and
13 responsibilities under this Decree.

14 E. Deadline for Submitting Claims Forms

15 A Class Member who does not opt out will be eligible to receive his or her proportionate
16 share of the settlement benefit. To receive this share, such a Class Member must properly and
17 timely complete a Claim Form in accordance with the terms of the Consent Decree. To be
18 effective, the Claim Form must be sent to the Claims Administrator postmarked no later than 70
19 days after the initial mailing of the Class Notice to class members. Settlement Class members
20 who do not file timely and valid Claim Forms shall nonetheless be bound by the judgment and
21 release in this action as set forth in the proposed Consent Decree, unless that Settlement Class
22 member timely opts out of the Settlement.

23 It shall be the sole responsibility of each member of the Settlement Class who seeks a
24 monetary award to notify the Claims Administrator if the class member changes his or her
25 address. Failure of a Settlement Class member to keep the Claims Administrator apprised of his
26 or her address may result in the claim being denied or forfeited.

27 F. Deadline for Submitting Motion Seeking Final Approval

28

1 No later than 35 days before the Fairness Hearing, Plaintiffs shall file a Motion for Final
2 Approval of the Settlement and Consent Decree. On or before one week before the Fairness
3 Hearing, the Parties may file with the Court a reply brief responding to any filed objections.

4 G. Deadline for Petition for Attorneys Fees

5 Class Counsel shall file with this Court their petition for an award of attorneys' fees and
6 reimbursement of expenses no later than 35 days before the Fairness Hearing. Class Counsel
7 may file a reply to any opposition to memorandum filed by any objector no later than one week
8 before the Fairness Hearing.

9 H. Deadline for Petition for Approval of Service Payments

10 Class Counsel shall file with this Court their petition for an award of service payments to
11 the Class Representatives no later than 35 days before the Fairness Hearing. Class Counsel may
12 file a reply to any opposition memorandum filed by any objector no later than one week before
13 the Fairness Hearing.

14 **VI. PLAINTIFFS' AND CLASS MEMBERS' RELEASE**


15 If, at the Fairness Hearing, this Court grants Final Approval to the Settlement and
16 Consent Decree, each individual Settlement Class member who does not timely opt out will
17 release their claims, as set forth in Consent Decree, by operation of this Court's entry of the
18 Judgment and Final Approval, regardless of whether he or she submits a Claim Form or receives
19 any share of the Settlement Fund.

20 **VII. APPOINTMENT OF CLAIMS ADMINISTRATOR**

21 Rosenthal & Company, LLC, of Novato, California is hereby appointed Claims
22 Administrator to carry out the duties set forth in this Order and the Consent Decree.

23 IT IS SO ORDERED

24 Dated: 4/4/08 _____
25


26 The Hon. Claudia Wilken
27 United States District Judge
28