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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

DAISY JAFFE, et al.,

Plaintiff,

v.

MORGAN STANLEY & CO., INC.,

Defendant.

Case No. C 06-3903 TEH

OBJECTORS' OBJECTIONS TO APPROVAL OF PROPOSED CLASS SETTLEMENT

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TABLE OF AUTHORITIES

The following class members, through counsel, respectfully submit these Objections to the proposed class certification and class settlement ("Settlement") for the Court's consideration: **Debra Frazier, Jonathan Glover, Latrissa Gordon, Peter Meme, Marshell Miller, Jerome Senegal, Marilyn White, Kenneth Winn ("the Objectors").** The Objectors understand that the Court permitted certain class members who have not opted out, the Moore Group, to participate in this proceeding prior to the preliminary approval of this class action and settlement. The Objectors appreciate the Court's diligence and willingness to consider the voices of absent class members. The Objectors respectfully ask the Court to consider at this stage the objections, arguments and evidence presented by the Moore Group in Docket Nos. 95, 119, 123, 129, 145, 152 in light of the entire record and new information presented to the Court. So as not to burden the Court with an extensive or duplicative submission, the Objectors state that they agree with the Objections and Supplemental Objections of the Moore Group and incorporate those objections as their own as if fully stated herein. In addition to the reasons contained in the previously filed objections of the Moore group, the Objectors urge the Court to deny class certification and final approval on the settlement on the grounds set forth below:

RELEVANT FACTUAL BACKGROUND

A. Facts Previously Presented to the Court.

The *Jaffe* lawsuit was filed on June 22, 2006 as a class action *gender* discrimination lawsuit, on behalf of female Financial Advisors ("FAs"). The *Jaffe* case lost the opportunity to proceed as a gender class action when Morgan Stanley chose to negotiate and ultimately settle with plaintiffs in a competing class action lawsuit that had been filed on the same day, *Augst-Johnson et al. v. MSDW,* Case No. 06-1142 (D.D.C.)

On August 8, 2006, a group of African-American current and former Morgan Stanley FAs (the "Moore Group") informed Morgan Stanley of their individual and class claims of *race* discrimination.[1] Docket 95, at Ex. 14, Stowell Letter. The Moore Group entered into a class

[1] The fourteen members of the Moore Group include current and former Morgan Stanley FAs of varying levels of production and tenure, FAs who are producing managers, and one rejected

(Footnote cont'd on next page)

tolling agreement and met with lawyers and executives from Morgan Stanley a number of times over the next 10 months to discuss the systemic obstacles and patterns of discrimination facing African-Americans at Morgan Stanley. The parties were assisted by a well-respected professional mediator, Linda Singer of JAMS.

This Court stayed the *Jaffe* lawsuit from January 2007 to August 2007, pending proceedings in the *Augst-Johnson* case. Docket Nos. 67, 72-76. On April 24, 2007, the *Augst-Johnson* parties moved for preliminary approval of a pre-certification settlement establishing programmatic relief and a monetary fund of $46 million. Docket 95, at Ex. 13.

Prior to August 2, 2007, neither of the *Jaffe* parties ever reported to this Court that the nature of the *Jaffe* lawsuit had changed from a putative gender discrimination class action lawsuit. Indeed, when Denise Williams, an African-American, was added as a plaintiff in October 2006, she brought only "individual race discrimination claims" on her own behalf and the case remained a gender class action. Docket No. 32 at 2.

On August 2, 2007, counsel for the *Jaffe* plaintiffs issued a press release announcing the settlement of class race and color discrimination claims for 1,200 African-Americans and Latinos via the dormant putative gender class action lawsuit. *See* Docket No. 95, at Ex. 11. On that same day, the parties informed the Court that the settlement in the *Augst-Johnson* gender class action had been preliminarily approved and that they would no longer seek certification of a gender class; they also sought to amend the *Jaffe* complaint to add another plaintiff and class-wide race discrimination claims based on the settlement of the new race class. *See* Docket No. 80 at 2, 3, 7, 23.

On August 1, 2007, the night before the *Jaffe* settlement was announced and the Second

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(Footnote cont'd from previous page.)

applicant. Members of the Moore Group have worked at over ten different Morgan Stanley offices across the country and collectively, have a wealth of knowledge about the Firm and the manner in which its policies and practices operate to disadvantage and exclude African-Americans, and how to address these shortcomings. Despite their simultaneous attempts to address the Firm's systemic discrimination, none were consulted during negotiation of the claims of an entire class of African-Americans or in crafting appropriate relief.

Amended Complaint filed, Morgan Stanley's counsel, Mark Dichter, first informed counsel for the Moore Group of the Firm's simultaneous, dual negotiations with the Moore Group and plaintiff's counsel in the *Jaffe* lawsuit. He further informed the Moore Group that Morgan Stanley had settled a "race and color" class action lawsuit for African-Americans and Latinos, although the case had not been filed.

Also on August 1, Mary Evans, an African-American producing Assistant Branch Manager in the Menlo Park office, received a phone call from an attorney for the *Jaffe* plaintiffs, who appeared to be attempting to solicit her as a named plaintiff in this case.[2] *See* Ex. 9. Evans is a member of the Moore Group.

The *Jaffe* Second Amended Complaint filed on August 2 alleged, for the first time, claims of class-wide race and color discrimination on behalf of classes of African-American and Latino FAs and FA-Trainees. *See generally* Sec. Am. Cmplt., Docket No. 81. Named plaintiff Williams was identified as a class representative for the African-American class for purposes of Title VII and Section 1981 claims, but not as a class representative for the "Minority" or Latino class. *Id.* at 5-6, counts 1, 2, 3, 4, 6, 8, 9.

Margaret Benay Curtis-Bauer was first added as a named plaintiff in the Second Amended Complaint and identified as a class representative solely for the Section 1981 claims for the "Minority" class, which included African-Americans and Latinos. *Id.* The Complaint did not identify any of the putative class representatives as Latino. *See id.* at 6. The terms of the settlement were not disclosed, nor was the settlement agreement filed with the Court at that time.

The parties agreed upon a class period beginning October 12, 2002, nearly five years prior to the date the Second Amended Complaint was filed and four years after the First Amended Complaint added plaintiff Denise Williams, who did not allege class claims of race discrimination in that complaint, nor had she filed a representative EEOC charge alleging class-wide

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[2] The Objectors are aware of other class members contacted during that time frame. In addition, after the Moore Group first raised its objections to the Settlement, African-American FA Marshell Miller received a similar call asking for support and to be a named plaintiff. *See* Ex. I.

discrimination. *See* Settlement and Sec. Am. Cmplt. There was no Latino class representative. In exchange for serving as a class representative, Curtis-Bauer would receive a $25,000 service bonus and $125,000 from the common class fund to resolve her individual non-class claims, which are time-barred.

B. Facts Not Previously Considered By The Court

No class representative knew of or consented to the terms of the Settlement agreement when it was reached on July 23, 2007. *See, e.g.,* Docket No. 107, Dichter Dec., at ¶ 9 (defense counsel Mark Dichter testified that the parties reached a tentative settlement agreement on July 23, 2007, during the parties' final day of mediation).

Denise Williams, an African-American woman and named plaintiff in this lawsuit, did not participate in any way in the negotiations of the settlement of the lawsuit that bore her name. *See generally* Ex. A, Williams Dec. Williams was not invited to attend any mediation sessions or allowed to participate in the negotiations of the class settlement. *Id.* at ¶ 5.

On July 30, 2007, Williams' lawyers e-mailed her a draft Second Amended complaint that identified only Williams and Daisy Jaffe as named plaintiffs. Ex. A, at A-1. Ms. Curtis-Bauer was not identified as a named plaintiff in the complaint. *Id.*

The July 30 draft complaint identified Williams as a class representative for a "minority" class that included African-Americans and Latinos. Ex. A at A-1. After Williams received and reviewed the draft complaint, she informed her lawyers that she would not serve as a class representative for Latinos because she believed she had insufficient knowledge of the experiences of Latino FAs and believed that the interests of the two groups were not aligned.[3] Ex. A, at ¶ 7. Thereafter, the lawyers attempted to locate another class representative. Indeed, on August 1, the day before the settlement was announced and the Second Amended Complaint filed, an attorney from Lieff Cabraser contacted Moore Group member Mary Evans about the case. Ex. D, Evans

[3] In response to Williams' refusal, the complaint was later re-drafted to eliminate Williams as a class representative for "minorities" and to limit her role as a representative for African-American FAs.

11/9/07 Dec.

Within a day or two after Williams refused to serve as a class representative for Latino Financial Advisors, she was told by her lawyers that they "had found someone else" to represent Latinos. Ex. A, at ¶ 8. Thus, the Second Amended Complaint named Williams a class representative for only an "African-American class," while Margaret Benay Curtis-Bauer was added as a plaintiff and class representative for the "minority" class, which also included Latinos. As of August 2, 2007, Williams was not aware of the terms of any class settlement with Morgan Stanley. Ex. A, at ¶ 6. Williams was also not aware of the participation of Ms. Curtis-Bauer, whom she has never met. Ex. A, at ¶ 8.

Curtis-Bauer had only become involved in the litigation after a Settlement was reached and admittedly in a very limited role. *See, e.g.,* Exs. C, E, F. On November 27, 2007, Ms. Curtis-Bauer spoke with Mary Evans, whom she considered a friend and has known for over 10 years, by telephone. Ex. C, Evans 12/13/07 Dec., at ¶¶ 3-5. During two calls, Curtis-Bauer told Evans that an attorney from Lieff Cabraser called and pressured her to participate in the *Jaffe* lawsuit and told her she only had three days to file, or words to that effect. Ex. C, at ¶ 6.c.-6.f. Curtis-Bauer admitted that she was torn about her participation in the lawsuit because she did not believe the settlement went "far enough" to remedy Morgan Stanley's discrimination, a sentiment she said she had shared with her lawyers. *See* Ex. C, at ¶ 6.g. Curtis-Bauer also told Evans that she thought the lawsuit only covered Morgan Stanley employees who worked in California. Ex. C, at 6.a.

Curtis-Bauer gave her home phone number to Evans and asked that other members of the Moore Group call her, which a few of them did. Curtis-Bauer made the same admissions to Moore Group members Brian Roy and Maurice Mabon about her late involvement and how she became involved in the lawsuit. *See generally* Ex. E, Roy Dec.; Ex. F, Mabon Dec. Curtis-Bauer told both men that she did not want to be an active participant but had agreed to lend her name to the lawsuit, or words to that effect. *See* Ex. E, at 5.f.; Ex. F, at 5.f. Roy and Mabon attended the Court's December 3, 2007 hearing prepared to testify about their conversations with Curtis-Bauer and the admissions she made to them, and Roy testified to his conversation before the Court with

Curtis-Bauer.

ARGUMENT

Rule 23 governs the rights and obligations of parties who desire to bind not only themselves but also to resolve the disputes of others. Before approving a pre-certification class settlement, the Court must first conclude that the proposed class meets the requirements for Rule 23 certification. *In re General Motors Corp. Pick-up Truck Fuel Tank Prods. Liab. Litig*., 55 F.3d 768, 794 (3rd Cir. 1995).

Likewise, the district court plays a critical role in ensuring the fairness and adequacy of proposed class action settlements. Thus, a class action settlement may be approved only when the Court finds that that the settlement's proponents have met their burden to show that it is fundamentally fair, adequate, and reasonable. *Linney v. Cellular Alaska Partnership*, 151 F.3d 1234, 1242 (9th Cir. 1998). Where a settlement was reached prior to class certification, the court must examine the settlement with special care and skepticism. *Staton v. Boeing Co*., 327 F.3d 938, 952 (9th Cir. 2003). Pre-certification settlements merit heightened judicial scrutiny because the court must protect the interests of class members who are not yet notified of the action and therefore lacked any opportunity to ensure that their voices were heard during negotiations. *In re General Motors Corp.*, 55 F.3d at 796 (discussing the problems presented by pre-certification settlements and the duty of courts to examine them with extra care). Pre-certification settlements also warrant extra scrutiny because they present unique temptations and opportunities for collusion. *See, e.g., Simer v. Rios*, 661 F.2d 655, 664-66 (7th Cir. 1981) (requiring that settlement proponents show that the compromise met a higher standard of fairness where negotiations occurred before certification).

Clearly, if the Court must view a pre-certification class settlement with skepticism, a settlement reached before a lawsuit was even filed merits the greatest possible judicial care to protect absent class members. Now that Denise Williams has offered her testimony, there can be no serious doubt that the settlement before the Court is lawyer-driven. *see* Ex. A. No current or former African-American or Latino FAs were present or participated in the negotiations. *Id.* More importantly, before a settlement in principle was reached, no current or former African-

American Financial Advisor were apprised of or approved its terms. *Id.*

Before the Court is a group of approximately 30 African-American FAs (including class members who opted out) who would have proudly served as class representatives and devoted their personal experiences and collective minds to negotiating fair compensation and injunctive relief for their colleagues. No lawyer would credibly argue that the settlement negotiations would not have been enhanced with client participation.

Thus, the question this case presents is whether Rule 23 authorizes lawyers to negotiate and settle the class action lawsuit that has not been filed, without the participation or consent of a client.. The Objectors respectfully suggest that clients are essential to Rule 23 and that the class was irreparably short-changed when lawyers met and negotiated class claims without the assistance of a steering committee of (or any) interested class representative who were present and willing or able to participate in the negotiations. To allow otherwise would only further the public's distrust for the legal profession by sanctioning the wholesale settlement of claims without requiring bargained-for exchange between real parties of interest.

A. Lawyers Are Not A Substitute For Clients.

Denise Williams' declaration leaves undisputed the fact that Morgan Stanley and lawyers spent months negotiating a class action lawsuit, before it was filed and without any client participation, consent or involvement. *See* Ex. A, Williams Dec. Clients, of course, are essential to every lawsuit because they bring both good and bad to the discussion and only resolve claims following compromise by both sides and a bargained-for exchange. Most lawyers would agree that it would be easier to win a motion without opposing counsel present for the argument and likewise easier to settle a case if the lawyer could just make the decision that the lawyer thought was in the best interest of the client. Our system does not work this way because clients, not lawyers, own their claims.

While one could make an argument that class counsel (post-class certification) may have a different duty than non-class lawyers in protecting the interests of the class, the law does not authorize a lawyer to negotiate a settlement for a putative class against the wishes of the only client who hired that lawyer and then search to substitute another client in the first client's stead,

all without ever filing a lawsuit, let alone litigating the lawsuit or seeking class certification. There is nothing in the law that authorizes the approach of a settlement with a plaintiff-to-be-named-later approach.[4]

The analytical approach of just skipping the question of how the deal was struck and conducting a post-hoc review of the result might seem reasonable. But that analytical framework entirely misses the mark. To extinguish the rights of absent class members, Rule 23 requires not only adequacy of counsel but also adequate class representation – two very different things. Here, the lawyers met and resolved a class claim without the knowledge or consent of their *only* client at the time, Denise Williams. As a result, we will never know what agreement would have resulted had Morgan Stanley been forced to debate and negotiate with their real opponents, African-American FAs. For the fifteen reasons identified below, the Objectors believe that the outcome would have been different and that the class was unlawfully and irreparably denied the rightful representation it deserved under Rule 23. Because these matters are of substance, the Court should deny class certification and final approval to the Settlement and require Morgan Stanley to engage in settlement discussions with the direct involvement of class members.

B. The Lack of Clients Resulted In An Inadequate and Unfair Settlement

The Objectors set forth below some of the deficiencies they believe would have been addressed had informed and engaged class members who suffered first-hand from Morgan Stanley's discriminatory practices been involved in the negotiations.

1. The Objectors would have brought a healthy skepticism and distrust of Morgan Stanley and would have required lasting and meaningful Court involvement and supervision.

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[4] This is not a situation where plaintiffs actively negotiated the settlement and decided not to participate or the replacement of a class representative post-certification. The cases plaintiffs cite where courts approve late substitution of the named plaintiff are inapposite. In both cases, the class had been certified, and class counsel appointed, for a considerable period of time *prior* to the settlement. *See Olden v. LaFarge Corp.*, 472 F.Supp.2d 922, 937-39 (E.D. Mich. 2007), *citing* Moore's Federal Practice § 23.25 (court may substitute a new representative *after* class certification); *Heit v. Van Ochten*, 126 F.Supp.2d 487, 494 -495 (W.D. Mich. 2001). In addition, the named plaintiffs backed out only after voicing approval of the settlement. In other words, in those cases, the class had an active representative throughout the process who, at least initially, approved of the settlement. Here, class counsel acted alone during the negotiations, and the sole named plaintiff objected to the terms of the settlement.

Most of the important legal gains in civil rights for employees, as with other aspects of society, have been achieved with ongoing, active court supervision. The Settlement does not require Morgan Stanley to provide any reporting to the Court regarding its progress, or lack thereof, in increasing the representation, tenure, compensation, and membership in management of African-Americans and Latinos. Worse, the Settlement seeks to strip this Court of jurisdiction and prohibits class members from seeking to enforce the terms of the Settlement.[5] All disputes can be raised only by class counsel and only in confidential, binding arbitration rather than before this Court. *See* Stlmt. at 46.

The Objectors would have insisted that Morgan Stanley submit regular reports to the Court and that the Court retain jurisdiction over the Settlement to ensure its enforcement and hear disputes. *Compare Smith v. Nike Retail Services*, No. 03-9110 (N.D. Ill. 2006) http://www.nikediscrimination.com/NikeConsentDecree.pdf (race discrimination settlement requiring data compilation and analysis, reporting to court at 6 month intervals; court maintains jurisdiction over parties and settlement to enforce terms and ensure relief); *Roberts, et al. v. Texaco,* No. 94-2015, 1997 U.S. Dist. LEXIS 23848 (S.D.N.Y. Mar. 21, 1997) (grants EEOC right to enforce and court jurisdiction over parties and race discrimination class settlement to enforce terms). Having seen Morgan Stanley introduce many "diversity" initiatives that failed to make any positive impact, the Objectors firmly believe that court involvement and oversight is an essential ingredient of success.

2. The Objectors would have required Morgan Stanley to agree to concrete, measurable goals and timetables to remedy its discriminatory practices.

The Settlement does not require Morgan Stanley to remedy its systemic race

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[5] The Settlement limits prosecution of enforcement of its terms to Lead Class Counsel or Morgan Stanley, and expressly precludes "third parties," including class members, from attempting to enforce any terms of the agreement. Stlmt., at X.A. This agreement was negotiated on behalf of a nationwide class of current and former Morgan Stanley employees and seeks to impose policies that will continue to affect Morgan Stanley employees for a period of at least five years. Class members and others affected by the Settlement should have standing to seek to enforce its modest terms. Moreover, due to the important issues at stake in this case, which affect thousands of employees, disputes regarding the enforcement of an agreement should be governed and resolved by this Court, and not in a private arbitration proceeding.

discrimination. Morgan Stanley need not hire or promote a single African-American, or achieve any measurable results in terms of eliminating, or narrowing, the racial disparities in compensation, retention, hiring, teaming, and promotion. Morgan Stanley has agreed only to use its "best efforts" and to retain experts to study and make proposals regarding these issues, which Morgan Stanley can then adopt, water down, or ignore altogether.[6]

Given Morgan Stanley's long history of discrimination, the Objectors would have been skeptical of the Firm's willingness or ability to voluntarily understand and resolve its entrenched racial discrimination. They would have therefore required the same types of measurable, concrete goals and timetables established in other employment discrimination class actions. *See, e.g., Martens et al. v. Smith Barney*, No. 96-3779, 1998 U.S. Dist. LEXIS 17666 (S.D.N.Y. Jul. 24, 1998) (gender discrimination class settlement against brokerage firm that set hiring and promotion goals and timetables and provided financial penalties for failure to meet goals).

The Objectors would not have authorized the selection of the same industrial psychologists commissioned by the *Augst-Johnson* settlement to study gender issues to also study and make proposals regarding issues facing African-American FAs. Nor would the Objectors have agreed to experts who routinely represent and testify for defendant-employers in class action employment discrimination lawsuits.

The role of the experts in this Settlement is central. Although Dr. Kathleen Lundquist is an accomplished expert, she has defended employers' policies in cases such as *McReynolds v. Sodexho*, a race discrimination class action settled for $80 million, in which the consent decree required the defendant to dismantle practices that "barred meaningful advancement for its black employees for years."[7] Dr. Lundquist is currently an expert for the defense in the nationwide race discrimination case, *Employees Committed for Justice v. Eastman Kodak,* 407 F. Supp. 2d 423

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[6] Moreover, the vast majority of the Programmatic Relief will occur under the terms of the *Augst-Johnson* Settlement, regardless of the outcome of this case

[7] "Sodexho Set for Overhaul After Lawsuit". Workforce Management, June 08, 2005. (available at http://www.workforce.com/section/00/article/24/07/43.html)

(W.D.N.Y. 2005). The allegations in this case are severe and shocking. After a four-year investigation, the EEOC concluded that Kodak's African-American employees suffered pay and promotion disparities and a shockingly hostile work environment, and over 700 complaints of racial discrimination were reported. *Id; see also Puffer v. Allstate*, Case No. 04-5764 (N.D. Ill.)(Lundquist serving as defense expert supporting employer's policies and culture despite statistically significant compensation disparities).

Victims of discrimination tend to credit others who allege similar practices, and class members would likely have preferred an expert not currently working to defend other firms accused of discrimination. There are a wealth of academics who have devoted their careers to addressing these important issues who are not litigation consultants and who would have instilled confidence in both sides. The Objectors are also concerned that Dr. Lundquist lacks financial services experience so will need to invest substantial time learning about the firm and the industry before her work can begin in earnest.

3. The Objectors would have insisted on transparency and disclosed all relevant information about the Settlement and its terms to class members so they could understand and properly evaluate the Settlement in order to decide whether to participate, opt-out or object.

Class members have been denied access to key information necessary to make informed decisions regarding their own options and to provide well-informed, meaningful input to the Court about the Settlement. First, the class has been denied access and the opportunity to review, understand and critique the proposed Account Distribution Policy and Power Ranking, which have been filed under seal, despite the fact they are to be published and provided to every FA at the Firm.[8] Class members' experiences bear directly upon the effectiveness of any proposed policy revisions and they may have important information to help the Court understand and assess the impact of these policies. The Court cannot effectively review the policy without fully

[8] Morgan Stanley offers no logical rationale for refusing to show the Power Rankings to class members prior to final approval of the Settlement. Had their been any real interest to adopt a policy that was fair and responsive to the complaints of African-Americans, there would be no reason to hide the policy from its beneficiaries.

informed input from class members.

The vast majority of class members are also likely unaware of Morgan Stanley's duplicitous, simultaneous negotiations with the Moore Group and *Jaffe* counsel, including its failure to disclose to *Jaffe* counsel the existence of a large group of putative class members concerned with the same issues challenged in this lawsuit. This is no small point given that the Settlement requires reliance on the good faith of Morgan Stanley.

In addition, class members, even named plaintiffs, have been denied access to Morgan Stanley's workforce data and damages calculations so they can provide information for the Court's consideration of the sufficiency of the Settlement's monetary relief, the appropriate scope of class member releases, and whether a conflict exists between African-American and Latino class members. *See* Docket No. 129. Without access to the above information, Class members cannot therefore make informed decisions about whether to participate or opt out nor can they provide the Court with complete objections based on all relevant facts.

4. The Objectors would not have approved a Power Ranking for account distributions because of the historical and ongoing discrimination against African-Americans and women at Morgan Stanley.

The Settlement's "new" account distribution policy and Power Ranking will not reform the Firm's discriminatory account transfer practices but will only serve to institutionalize the discrimination and widen the current client base and compensation gap between African-Americans and other FAs.

Although a new policy and Power Ranking was established under the *Augst-Johnson* gender settlement and has been instituted by Morgan Stanley, these policies have not been disclosed to class members. The Objectors understand that the "Power Rankings" still improperly rely on factors tainted by discrimination in order to determine an FA's ranking to receive lucrative account distributions. Because of preferential and discriminatory account assignments and partnerships, among other things, non African-American FAs have substantially larger books of business and revenue production. As a result, they will fare better under the Power Ranking, ensuring that African-Americans will lose out in future account distributions.

The Objectors would not have agreed to a policy that locks white men at the top of the rankings and rewards them for past and ongoing discrimination.

Other Wall Street firms have grappled with issues regarding equal opportunities in account distributions for years. One firm, UBS PaineWebber, recently agreed to the random distribution of accounts to tackle the problem. The Objectors offer the Court one explanation of why a power ranking will never work. No rational person could assert that race discrimination does not exist in society. A simple example is helpful to explain. Suppose a manger gave a presentation to a group of prospective clients. At the end of the presentation, the manager directed the group to either of the two FAs sitting at the back of the room to open an account. One FA is African-American, and the other is a white male. The prospective customers know nothing else about these persons, although in fact the African-American FA graduated from Stanford and has been with the Firm for 20 years, while the white FA has no college degree and is a rookie FA. If at the end of this experiment, the white broker signed up double the number of clients, the Objectors would argue that Morgan Stanley has isolated a near-perfect measure of racism in society. Under the Power Ranking, however, Morgan Stanley would simply label and reward the white broker for being "better" at developing new business. A Power Ranking punishes African-Americans for societal racism and rewards white brokers for the same. This is the kind of debate that the Moore Group began and would have continued with Morgan Stanley to determine how to devise an equitable system of account distributions.

Morgan Stanley's decision to step aside from this debate and to instead work with lawyers from whom Morgan Stanley hid the existence of the Moore Group is shameful. Clearly, Morgan Stanley preferred the Power Ranking because it would not disturb the status quo and would allow Morgan Stanley to guarantee that its top producing white male FAs would continue to receive the lion's share of distributions. The Court will never know how the Power Ranking worked because there is no obligation on the part of Morgan Stanley to report the results to the Court.

5. The Objectors would never have agreed to a Settlement that did not reform partnerships, or teams of FAs, which work to the huge disadvantage of African-Americans.

Any settlement that does not seriously reform Morgan Stanley's team policies will accomplish little in terms of improving the outcome for African-American FAs. The Settlement not only fails to meaningfully modify the Firm's teaming policies or ensure African-Americans inclusion in favorable teams, it aggravates the disparate impact of the teaming policies by codifying and prohibiting from challenge the cumulative advantage created by these segregated teams.[9]

For example, the Settlement expressly provides that assets of retiring brokers who have been in a "team" for two years do not pass through the power ranking system.[10] The Objectors would not have allowed this end-run around the account distribution policy, which permits white men to select their successors and "team" for the last two years of their employment in order to transfer assets. To illustrate, if a high producing FA decides to retire rather than leaving Morgan Stanley's employ, he often teams for two years with another FA who, in essence, buys the book over two years by working it and giving the high producer a cut of the production. African-Americans are excluded from these types of arrangements due to racial bias. The Objectors would have made sure that counsel understood and rejected this practice as unlawful, as it is the

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[9] The Settlement expressly codifies the discriminatory practices of (1) allowing accounts to transfer through partnerships rather than according to ranking or through the account distribution policy, *see* Stlmt. at VII.D.5, and (2) allowing FAs to garner points under the Power Ranking system for assets received through partnerships, and not developed from their own efforts, *see id.* at VII.D.5.c. Because African-Americans do not receive these "gifts," they are at a competitive disadvantage.

[10] The sole limitation proposed on partnership transfers is that a partnership be in place for two years before distribution of an entire book to remaining partners upon the retirement of one partner. Stlmt., at 26. Two years is not a long time to wait to inherit a substantial book of business, and is less than many firms require. This rule will not curb the frequent "gaming" of the partnership system, *e.g.* the use of 98% -2% ownership interests, or a partnership where the retiring partner remains employed but seldom comes into the office while the team waits for the two years to pass. In short, the two-year requirement will have no impact on the discriminatory operation of sham partnerships to deny African-Americans access to quality accounts and high net worth clients. The ineffectiveness of this proposal is illustrated by the failure of a similar policy that has been in place for years at another firm; this firm's even longer 3-year wait period has not improved the discriminatory operation of partnerships on African-Americans. *See* Ex. 145-21. *McReynolds et al. v. Merrill Lynch* Complaint, Case No. 05-C-6583 (N.D. Ill.), at 14, 15 (regarding impact of partnerships).

single greatest contributor to the exclusion of African-American FAs from account transfers.

Morgan Stanley has not been forthcoming about teams in its statements to this Court and to class counsel. Teams are a firm-wide initiative promoted at the highest levels of Morgan Stanley. *See, e.g.,* Docket 145-6, at ¶¶ 12-21; 145-7, at ¶¶ 19-28; 145-8, at ¶¶ 26-37; 145-9, at ¶¶ 18-20. FAs are strongly encouraged, and sometimes pushed, to be on teams, and managers are trained to facilitate the formation of teams. *Id.* Most importantly, **all teams must be approved by management**, which also presides over team dissolutions. *Id.* In the collective experience of the Objectors, management is intimately involved in the formation of, and frequently arranges, teams. *Id*.

Because they lacked class member involvement, class counsel relied upon on Morgan Stanley's misrepresentations that there were no teaming policies and that nothing could be done about teams and tailored the Settlement accordingly. As class counsel explained to this Court:

> **We looked at Injunctive relief in partnerships from the perspective of if we win what can we do about it? And what we concluded was it wasn't a company policy and we wouldn't be able to get direct injunctive relief about this**. This isn't Shelly versus Kramer where the company giving approval, but they're saying you can't have a partnership with people of different colors. … so we were cognizant of it, but we did what we thought we could, but still something that we don't think we could do if we litigate it. 12/4/07 Tr. at 69, 81 (emphasis added).

Again, Morgan Stanley was not forthcoming. As Morgan Stanley is well aware, the EEOC and at least one federal court have determined that the Firm does have teaming policies and that those policies may constitute discrimination under the civil rights laws. In July 26, 2006, after an investigation, the U.S. Equal Employment Opportunity Commission ("EEOC"), found reasonable cause to believe that Morgan Stanley's policy of allowing financial advisors to subjectively choose partners for lucrative agreements resulted in a female FA being unlawfully denied a partnership because of her sex. *See* Ex. H, EEOC Cause Finding; Ex. F *Dodson* Article. In denying Morgan Stanley summary judgment, a federal court agreed that a jury could find the Firm's teaming practices discriminatory. *Dodson v. Morgan Stanley DW, Inc*., No. 06-5669, 2007 U.S. Dist. LEXIS 85535 (W.D. Wa. Nov. 8, 2007)..

The Objectors would not have accepted that there can be no equitable relief of Morgan

Stanley's teaming policies. Again when one looks at the history of gains in the civil rights movement, there are parallels. For example, male police officers feared partnering with female officers thirty years ago. Perhaps they worried that their wives would object or thought that women partners increased danger, but the law did not allow police officers to team only men with men. Today, virtually every police department in the country is integrated by gender due to the hard work of the Justice Department and the unwillingness of the law to accept that the personal preferences of some employees trumps the equal employment rights of others.

Similarly, many employers, including law firms, assign teams of employees to work on various clients and matters, and Morgan Stanley could certainly do the same. If segregated teams are the result of racial preference among employees, Morgan Stanley cannot permit, let alone promote, teams. Morgan Stanley's policies could similarly be revised so as not to reward FAs in teams by including team assets in their power ranking. Without a meaningful solution to the problem of teams, the Settlement will not improve the outcome for African-American FAs.

6. The Objectors would have understood and been empathetic to the plight of African-American class members, who are frequently isolated and excluded at Morgan Stanley, and tailored appropriate injunctive relief.

It is likely that only an African-American FA who has worked as the "only" African-American in his office would be in a position to explain why some of the proposed diversity initiatives will not work or will create additional problems.

As a result, when crafting proposals, the Objectors would have taken into careful consideration the heightened scrutiny, exclusion and isolation faced by most African-American FAs at Morgan Stanley. For example, in attempting to "reform" the account distribution policies, the Settlement does not require that information regarding account distributions be published but requires an FA to ask his manager to review supporting documentation (albeit limited information) regarding account distributions. Managers play important roles in branch offices, as they implement Firm-wide policies and distribute valuable resources and opportunities. Therefore, even if they believe the rules are not being followed, many African-American FAs already feel as if they are under a microscope and would be reluctant to challenge management's decisions for fear of retaliation or being branded a "troublemaker." See Ex. J, Barnett Dec.

(explaining difficulty and strain of relationship with manager when asked for information regarding account distribution).

The Objectors would have insisted that full information about account distributions be published and available to all FAs in the office. There is precedent for such a policy as the class reps in the *Cremin v. Merrill Lynch* class action insisted upon such a provision so account distributions could be studied for fairness.

7. The Objectors would have calculated the damages suffered by the class to properly measure the losses suffered by class members and to value and include all recoverable damages.

Had class members been involved in negotiating the Settlement, they would have insisted on a class damages calculation that valued all damages recoverable under the law, for all class claims. The civil rights laws provide substantial "make-whole" relief for victims of discrimination. *Albermarle Paper v. Moody*, 422 U.S. 405, 419 (1975). To further the goals of Title VII and Section 1981, backpay is presumptively due to prevailing plaintiffs. *See EEOC v. O&G Spring*, 38 F.3d 872, 880 (7th Cir. 1994); 42 U.S.C. § 2000e-5(g)(1). Section 1981 plaintiffs may seek unlimited damages for emotional distress and punitive damages, unlike Title VII plaintiffs whose compensatory damages are capped. *See, e.g., Zhang v. Am. Gem Seafoods, Inc.,* 339 F.3d 1020, 1044 (9th Cir. 2003). Front pay is allowed, *Williams v. Pharmacia*, 137 F.3d 944, 951-52 (7th Cir. 1998), and wage losses also may include lost fringe benefits, such as retirement benefits, health insurance costs and other compensatory amounts. *See, e.g., Taxman v. Bd. of Educ.* 91 F.3d 1547, 1552 (3d Cir. 1996).

Toward establishing the adequacy of the $16 million common fund, plaintiff's counsel argued that the maximum possible damages the class could ever recover was $36 million. Transcript, Docket No. 131, at 13. Plaintiff's counsel recently disclosed that its $36 million damages calculation was based on a simplistic "compensation shortfall" analysis, which captures wage differentials for current employees and thus measures earnings disparities *only* for the period during which class members worked at the Firm. *See* Motion For Leave To File Under Seal, Docket No. 132, at 2-3; Docket No. 133, Finberg Dec., at ¶¶ 2-3; Docket No. 145-2. Goldman Dec. It does not appear that plaintiff's counsel made any attempt to value losses based

on account transfers lost as a result of the Firm's discriminatory account distribution and teaming practices, nor did they value the loss of opportunities to join management.

The compensation shortfall damages calculation does not capture the losses of class members or the damages recoverable as a matter of law. In addition to failing to consider the possibility of punitive or compensatory damages, class counsel's approach omits all post-employment losses, including post-employment backpay and front pay. Thus, although the proposed settlement requires class members to release termination claims due to low production, the damages calculation did not value losses that result from termination, which can be catastrophic. Docket No. 87-2, Notice at 13. The undervalued losses from termination are acutely felt by African-American class members, who suffer an extremely high rate of attrition.

The compensation shortfall analysis similarly undervalues the claims of currently employed African-American class members by excluding front pay. Due to the denial of resources and opportunities, African-American FAs who survive at Morgan Stanley are disproportionately grouped in the lower range of client assets, production and income levels as compared to Caucasians and Latinos. *See, e.g.,* Ex. 6; Ex. 7. Therefore, a compensation shortfall analysis that ends in 2007 will not accurately determine the harm that will be suffered in the future by tenured African-American FAs. Any damage model must include front pay to value the ongoing cumulative disadvantage to African-American FAs.

Jaffe counsel also offer no explanation for why the Settlement model did not include emotional distress damages. Here again, the involvement of class members in the discussion would have caused counsel to better understand and include this element of damages in the discussion.

8. The Objectors would have insisted upon a higher financial recovery to the class.

The Objectors would never have agreed to extinguish the claims of 1,300 class members in exchange for a class fund that averages $12,000 per class member for losses over a five-year class period. Class members have suffered substantial losses as a result of Morgan Stanley's discrimination, particularly given that an average Morgan Stanley FA earns annual compensation of well over six figures.

Indeed, Morgan Stanley recently agreed to settle an individual discrimination lawsuit brought by a Financial Advisor based in part on management's exclusion of the plaintiff from a lucrative partnership in favor of a male FA. *See* Ex. G, *Dodson v. Morgan Stanley DW, Inc.* Article. Dodson's sex discrimination claims are nearly identical to the race discrimination claims of many members of the class, and her recovery of $750,000 at the settlement stage demonstrates the insufficiency of the Settlement's monetary relief.[11] As the cases cited by the Moore Group demonstrate, the $16 million settlement fund pales in comparison to that in similar class cases.[12]

9. The Objectors would have asked class members to release claims for which they were not being compensated, including termination and promotion claims.

Having only sought damages for the limited wage claims captured by a "compensation shortfall" analysis, class members should release claims for only the limited wage losses and claims captured by this analysis. Class members should not be required to release claims or damages not included in the compensation shortfall analysis that was the starting point for negotiations or claims for which they are not being offered compensation, including claims for termination, denial of promotion, emotional distress, punitive damages, front pay and others not sought by the class.

10. The Objectors would not have allowed special treatment of any class

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[11] *Sumner v. Merrill Lynch* Arbitration Award ($2.2 million awarded to individual FA in sex discrimination case); *Hardin v. Merrill Lynch* ($501,979 award); *Marcus v. Merrill Lynch* ($558,000 award); *Twombly v. Merrill Lynch* ($210,000 award); *Wyatt v. Merrill Lynch* ($284,712 discrimination award); *Zubulake v. UBS Warburg LLC*, No. 02-1243 (S.D.N.Y. 2005) (jury awarded $29 million in compensatory and punitive damages to equities broker terminated for reporting gender discrimination); *Sojaji v. Merrill Lynch & Co*. (NASD panel awarded $400,000 in compensatory damages and $1.2 million in punitive damages to broker fired because of his race). *See* Docket No. 145, Exs. 13-17, 21-22.

[12] *See, e.g., Cremin v. Merrill Lynch,* Docket No. 145, Ex. 11 ($200 million paid to resolve claims of class members); *Martens v. Smith Barney,* Docket No. 145, Ex. 25. *See also Roberts v. Texaco, Inc*., No. 94-2015, 1997 U.S. Dist. LEXIS 23848, at *4 (S.D.N.Y. Mar. 21, 1997) (class of salaried African-American employees attained a settlement valued at over $193 million, with average awards in excess of $63,000, along with pay equity corrections (i.e., raises) averaging more than 11%, a benefit valued at more than $4 million in the first year alone); *Ingram v. The Coca-Cola Co*., 200 F.R.D. 685, 688 (N.D. Ga. 2001) (African-American salaried employees settled for overall value of $176 million and received guaranteed cash awards averaging $38,000 per class member, as well as $10 million bonus fund for class members promoted during next ten-year period and a pay equity provision worth $43.5 million in employee raises).

representatives.

The Objectors would have required that class representatives be willing to stand in the shoes of absent class members so that they could fairly evaluate the Settlement. They would not have permitted any class representative to be compensated for their non-class claims from the common fund established to compensate class members for class claims. The $125,000 paid to Curtis-Bauer for her time-barred, non-class claims is likely 10 times what she will receive for filing a claim and created an improper incentive for her to rubber-stamp the settlement that had been negotiated before she joined the lawsuit. This irreconcilable conflict of interest gave Curtis-Bauer little incentive to critically assess the Settlement, and provides class members with no confidence that Curtis-Bauer was acting in the best interest of the class.

11. The Objectors would not have agreed to a single class of African-Americans and Latinos, particularly with a single common fund to be distributed by a single formula.

The Objectors do not believe that the experiences and discrimination suffered by African-Americans and Latinos at Morgan Stanley are the same, and they would not have agreed that they be joined in a single class. Nor would the Objectors have considered a Settlement affecting the rights of Latinos without a Latino class representative.

African-Americans and Latinos are treated differently and have different outcomes and opportunities at Morgan Stanley. Latinos have access to markets where they need not compete with Caucasian FAs; African-Americans do not. *See, e.g.,* Docket Nos.145-6, at ¶¶ 3-9**.** The Objectors also understand that Latinos do not face the same barriers regarding teams. *Id.* As a result, Latinos will likely fare better on the Power Ranking. Thus, there is an antagonism between the groups, as Latinos out-earn African-Americans and the two groups compete for resources and opportunities. The Settlement's establishment of a single fund allocated by a single formula that appears to favor Latinos over African-Americans, due to their higher attrition rates, also creates an actual conflict between the groups.

More importantly, the Objectors strongly believe that when Wall Street firms consider all minorities "diverse" and do not focus on the unique issues facing any particular group, the probability of fixing the problems is substantially reduced. African-American and Latino FAs

face different impediments in the marketplace and the workplace. The Objectors believe that just as women were in a separate class with initiatives designed to address their issues, the same should have been done for African-American FAs. The idea that the problems are the same because the compensation shortfall shows losses that are "close enough" is naïve, and debunked by the differences in attrition rates.

12. The Objectors would have been typical plaintiffs who bring with them what some may consider unreasonable expectations.

As the Court has acknowledged, the monetary relief offered to class members is low, the Objectors believe extraordinary low, in relation to the class members' losses. The plaintiffs' lawyers justify this low dollar amount by asserting that this case is about change and offering the programmatic relief as the Settlement's centerpiece. However, the overwhelming majority of class members are former employees who suffered catastrophic career losses due to discrimination. They will not benefit from the diversity initiatives and had a right to participate in the dialogue of whether their claims were traded off for injunctive relief. Alternatively, they might have insisted that the fund get distributed differently. Oddly, under the plan for distribution, a current employee who has been with the Firm since 2002 will get the benefit of the initiatives and more money than a class member who suffered career-ending losses. Again, this debate never took place because no plaintiffs were in the negotiating room. In two similar cases (*Martens* and *Cremin*), there were 20 and 8 class representatives in the negotiating room, and the end-result was agreement as to alternative dispute resolution process whereby claims would be treated individually so that any monies paid by the Defendant would be paid to the most serious claims.

13. The Objectors would have insisted that Morgan Stanley guarantee class members, and all employees, access to the courts for civil rights claims.

The Objectors would have insisted that the Firm agree not to institute mandatory arbitration during the period of the Settlement and consent decree. One of the most meaningful reforms brought about by litigation in the 1990s against Wall Street firms was the end to mandatory arbitration of civil rights claims. Most employees of retail brokerage firms now have the right to pursue their civil rights claims in the courts with full due process rights. Any

meaningful settlement should include Morgan Stanley's agreement not to force mandatory arbitration of civil rights claims for at least the duration of any consent decree in this case. Any progress made as a result of access to the courts will be lost if the right to pursue one's civil rights in a court of law are lost.

14. The Objectors would have ensured that the class received adequate notice and full information about the Settlement and its negotiations.

So that all class members would have an opportunity to carefully weigh their options and critically assess the Settlement, the Objectors would have insisted on effective notice and full and fair disclosure of all important information regarding the history of the lawsuit, the Settlement and its negotiations. As an initial matter, the Objectors question how many class members actually received the Notice and had the opportunity to learn of and act upon their rights in this Settlement. For a class that dates back nearly six years, and given the extraordinarily high attrition rates of class members, the last known addresses maintained by Morgan Stanley may not be accurate. Indeed, the Objectors are aware of many class members who did not receive the Notice, which does not appear to be contained or referenced on the websites of plaintiffs' counsel. *See, e.g.,* http://www.lieffcabraser.com/class_notices.htm

Even class members who received the Notice did not have access to full and complete information regarding the case. The Notice repeatedly refers class members to a website for additional information, including case pleadings.[13] *See* Notice, at pages 1, 15, 16. That website, however, has never been activated. A class member who enters the website is taken to a site that simply says "Text to come." *See* Ex. B. Additional notice and time for class members to act is warranted under the circumstances.

Class members are likely not aware of the history of this lawsuit and its negotiations, or the parallel negotiations of the Moore Group. The class will not know that the named plaintiff Denise Williams is opposed to this Settlement and has opted out, or that the class was represented

[13] The name of the case was also changed in the Notice to *Curtis-Bauer v. Morgan Stanley*, rather than using the *Jaffe* moniker that may be known to class members, which may have been confusing and precluded class members from accurately performing internet or other research on the case.

by a person involved in the case for, at most, one week prior to the execution of a Settlement. Had class members known of these, or other facts or objections, they may have made different choices, and may have objected or chosen to opt out of the Settlement.

15. The Objectors would have known of *Ledbetter v. Goodyear Tire.*

As this Court is aware, the Supreme Court's decision in *Ledbetter v. Goodyear Tire*, 127 S.Ct. 2162 (2007), has resulted in employers arguing that each paycheck does not trigger a new violation. Morgan Stanley does not dispute the statistically significant compensation disparities between white and African-American FAs. If *Ledbetter* were not the law, *Jaffe* class members could continue to fight for equal wages with each paycheck that resulted in lower pay. Thus a settlement in 2008 would not bar an African American FA from brining a suit in 2009 for paychecks received that year due to conduct in 2008. Following *Ledbetter*, however, Morgan Stanley will no doubt argue in defense of a class member's compensation claim brought in the year 2009 that the FA released and cannot recover for the discrimination that occurred in the class period even if that discrimination resulted in continued lower wages. It is in this light that the $16,000,000.00 common fund must be judged. The $16,000,000.00 is not fair, adequate or reasonable to compensate past, present and future wage loss and retirement losses caused by the discrimination during the class period. This amount never would have been accepted by a thoughtful, committed group of African-American FAs representing the class.

C. Other Indicia Of Inadequacy Of Settlement

Perhaps the most telling evidence of the inadequacy of this Settlement is that none of the law firms who represent the class appear to be very proud of it. Lead counsel Lieff Cabraser does not include this case or Settlement under the list of cases on its website, although other employment cases are prominently displayed, along with press releases and links to additional information and websites.[14] The other law firms' websites similarly contain little mention or additional information about the case, nor do they provide class members with any information about their rights under the Settlement.

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[14] *See* http://www.lieffcabraser.com/current_cases.htm.

While the Notice to class members from the Court included repeated references to a web site that exists to help class members understand their rights, the only information on the class website, racecaseagainstMorganStanley.com is the words "text to follow." See Ex. B. The Objectors hope and pray for relief for the class and that the "text to follow" will be an Order from this Court denying class certification and final approval to the settlement.

REQUEST TO APPEAR AND BE HEARD

The Objectors respectfully request that their counsel and certain members of their group be permitted to appear at the Fairness Hearing and present their objections to the Court on their behalf.

CONCLUSION

Because there is opposition to the settlement and it was not the product of a bargained-for exchange between the clients, the Court should deny final approval to the Settlement and require Morgan Stanley to negotiate with a steering committee of victims who undertake (without promise of special treatment) to represent the class alongside their lawyers.

Respectfully submitted,

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