United States Court of Appeals, Ninth Circuit.
Daisy JAFFE and Margaret Benay Curtis-Bauer, Plaintiffs-Appellees,
v.
Jonathan GLOVER, Latrissa Gordon, Marilyn White, Peter Meme, Marshell Miller, Jerome Senegal, Hubert Stalling, Lanta Evans-Mott, Carlton McDowell, Sarah Nyamuswa and Theron Cyrus, Objectors-Appellants,
v.
Morgan Stanley & Co., Inc., Defendant-Appellee.
No. 08-17599.
November 25, 2009.

Appeal from a Decision of the United States District Court for the Northern District of California, No. 3:06-cv-03903-TEH • Honorable Thelton E. Henderson

Brief of Appellants

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CORPORATE DISCLOSURE STATEMENT

This statement is made pursuant to Fed. R. App. P. 26.1. Objectors-Appellants (hereinafter "Objectors") are not, do not comprise, and/or are not a part of a corporate entity nor have any parent corporation(s), subsidiaries, or affiliates that have issued shares to the public.

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JURISDICTIONAL STATEMENT

The United States District Court for the Northern District of California ("the District Court") had jurisdiction over the Title VII, Section 1981, and state law claims brought in the lower court proceeding under 28 U.S.C. § 1331, 1343 and 1367 and 42 U.S.C. § 2000e-5(f)(3). The District Court granted class certification and approved the parties' settlement in an order dated October 22, 2009. Dkt. 249.[FN1] On November 21, 2008, Objectors-Appellants ("Objectors") timely filed this appeal of the court's final order and judgment and preceding orders. ER 354-55. This Court has jurisdiction to entertain this appeal under 28 U.S.C. § 1291.

FN1. These docket numbers reflect docket entries in the district court case in the matter of *Jaffe, et al. v. Morgan Stanley & Co., Inc.*, Case No. 06-03903 (N.D. Cal.). Docket entries to *Jaffe v. Glover v. Morgan Stanley*, Case No. 08-17599, shall be herein referred to as "App. Dkt. ___."

NINTH CIRCUIT LOCAL RULE 28-2.6 STATEMENT

Objectors have no knowledge of any other pending cases before this Court related to the issues herein.

ISSUES PRESENTED FOR REVIEW

1. Whether counsel may negotiate and execute a settlement agreement on behalf of a class of plaintiffs when no lawsuit has been filed, no court has appointed class counsel, and the sole client and putative class representative opposes the settlement.

2. Whether a class of Latinos and African Americans is adequately represented or a conflict exists when the sole class representative, an African American employed for the first month of a five year class period, was solicited to serve as a class representative plaintiff only *after* a pre-filing settlement was reached and rejected by the original plaintiff and was offered and accepted a payment of $125,000 (many multiples of what any class member will receive from the class fund) to resolve her time-barred non-class claims, and when a single common fund is allocated to class members based on a single formula that disproportionately favors Latino FAs.

3. Whether given its procedural posture and history of negotiations, the settlement of this race discrimination class is fair and adequate when its "centerpiece" is injunctive relief nearly identical to that ordered to resolve a gender discrimination lawsuit and the District Court concedes its monetary relief is "low" compared to the earnings of class members and is based on a calculation that does not value claims that class members must release and damages recoverable as a matter of law.

4. Whether class members are entitled to the discovery and access to evidence submitted under seal and *in camera* necessary to assess class representation and the adequacy of the class settlement, when the settlement was settled before it was filed, over the objection and without the approval of a class representative who claims she was denied information and input, then ratified by a class member who received a special non-class payment, and the "centerpiece" of the settlement is injunctive relief largely copied and already court-ordered in a gender discrimination lawsuit and monetary relief based on a calculation excluding damages for certain claims released and damages plaintiffs are entitled to as a matter of law.

STATEMENT OF THE CASE

On June 22, 2006, *Jaffe v. Morgan Stanley,* Case No. 3:06-cv-03903, was filed in the District Court for the Northern District of California as a nationwide gender discrimination class action with Daisy Jaffe as the sole lead plaintiff. Compl. at ¶9, ER 1265. On October 10, 2006, the complaint was amended to add Denise Williams as a lead plaintiff, but the case remained a gender discrimination class action. See First Am. Compl., ER 1244. On August 2, plaintiff filed a motion for leave to amend the complaint and convert the case into a race and color discrimination class action. ER 1213. On the same day, the parties announced they had settled the race and color class claims. *Id*.

On August 17, 2007, plaintiffs filed their Second Amended Complaint, for the first time alleging classwide claims of race

and color discrimination, and adding named plaintiff Margaret Benay Curtis-Bauer. ER 1185-1186. On October 22, 2007, plaintiff's counsel sought class certification and preliminary approval of the proposed settlement. Dkt. Nos. 87, 88. Plaintiff's counsel did not inform the District Court that Williams had rejected the settlement terms. *See Id*.

Over twenty class members filed objections to class certification and preliminary settlement approval on November 9, 2007. Dkt. 95. On December 3, 2007, the District Court held a hearing, and afterward requested supplemental briefing by the settling parties about the adequacy of class representation and the terms of the proposed settlement. 12/3/07 Trans. ER 1-103. The District Court declined to accept or consider the Objectors' 15 page brief with additional evidence and law regarding the issues raised by the District Court. *See* Dkt. 259.

In a February 7, 2008 Order, the District Court granted provisional class certification and preliminary approval of the settlement and ordered notice to the class. ER 321-344. The District Court also denied Objectors' motions for discovery regarding the proposed settlement and for access to documents filed under seal and *in camera* by plaintiff's counsel. ER 322. By this time, thirty class members had submitted objections to the approval of the settlement. *See, e.g*. ER 948-974 (letters from Objectors); ER 537-573; 413-18; 465-68 (Declarations of Objectors).

After a fairness hearing, the District Court ordered an evidentiary hearing before the Magistrate Judge to "revisit [the Court's] provisional certification of the class and make further inquiry into whether absent class members have been adequately represented." ER 222. The court also expressed doubt whether "as a matter of law or fact, there was adequate representation at crucial stages of litigation," and "whether Miss Curtis Bauer's involvement as a representative was sufficient to cure any due process problems." ER 317-318.

On July 23, 2008, plaintiff's counsel moved the District Court to reconsider its order for an evidentiary hearing. Dkt. Nos. 225, 226. The District Court granted the motion on October 22, 2008, and simultaneously certified the class and granted final approval to the class settlement. ER 104-129; 219-21. On November 21, 2008, Objectors petitioned this Court for appeal. ER 354-55.

STATEMENT OF FACTS AND PROCEDURAL BACKGROUND

I. Evolution of *Jaffe v. Morgan Stanley* From A Gender Discrimination Class Action To A Race And Color Discrimination Class Action

On June 22, 2006, two nearly identical gender discrimination class action lawsuits were filed against Morgan Stanley in federal courts. Daisy Jaffe (a Caucasian) sought to represent a nationwide class of female Morgan Stanley Financial Advisors ("FAs") and Financial Advisor-Trainees ("FA-Trainees"). Compl. at ¶9; ER 1265. Her complaint did not include any individual or class claims of race or color discrimination. *Id*. Earlier that same day, six plaintiffs had filed a nearly identical putative class action in federal district court in Washington, D.C., *Augst-Johnson et al. v. MSDW,* Case No. 06-1142 ("*Augst-Johnson*"). *See* 1/19/07 Order, Dkt. 67, at 1. The *Augst-Johnson* lawsuit was filed after nearly eighteen months of settlement negotiations with Morgan Stanley. *Id*.

On October 12, 2006, the *Jaffe* complaint was amended to add an additional plaintiff, Denise Williams (an African American), who also sought to represent a class of female FAs. First Am. Compl at ¶1244. As plaintiff's counsel informed the District Court, "the central allegations of the complaint have not changed in any material respect. It remains a national gender discrimination class action challenging compensation and business allocation practices. Besides the new named plaintiff, the only change is that the amended complaint adds overlapping and identical gender claims under Michigan law...." ER 1238. Plaintiff Williams also brought "certain individual race discrimination claims, which" were not "brought on behalf of anyone but Ms. Williams." *Id*. Indeed, plaintiff's counsel stated that "[c]ontrary to Defendant's

assertions, the recently-filed Amended Complaint merely adds one plaintiff, who brings certain *individual* race claims not previously alleged, but does not in any way modify the original allegations ....” ER 1237 (emphasis in original).

In January 2007, the District Court stayed the *Jaffe* proceedings because of ongoing settlement negotiations in *Augst-Johnson. See* Dkt. 67. On April 24, 2007, the *Augst-Johnson* parties moved for preliminary approval of a pre-certification settlement class of female FAs and FA-Trainees and a settlement agreement providing $46 million and programmatic relief to the class. ER 882; 896, *Augst-Johnson et al. v. Morgan Stanley* Settlement. By stipulation, the *Jaffe* stay was extended again at least three times, until August 6, 2007. *See, e.g.,* Dkt. 77, at 1, 3; *see also* Dkt. Nos. 73, 74, 75. The *Augst-Johnson* court preliminarily approved the settlement on July 17, 2007. ER 1212.

On August 2, 2007, counsel for the *Jaffe* plaintiffs issued a press release announcing a settlement of unfiled class race and color discrimination claims for 1, 200 African Americans and Latinos as part of their dormant putative gender class action lawsuit. ER 1081. The *Jaffe* parties claimed to have reached a settlement of these class-wide race and color discrimination claims on August 2, 2007, despite the fact that no class race and color discrimination claims had been filed or prosecuted before August 2, 2007. Dkt. 87. The terms of the settlement were not disclosed. *Id*. Prior to August 2, 2007, no one informed the *Jaffe* court or the plaintiff class that the lawsuit was anything but a putative gender discrimination class action lawsuit.

On the same day the settlement was announced, Plaintiff's counsel sought leave to file a Second Amended Complaint that would transform the case from a gender class action to a race and color class action. ER 1213. Plaintiff's counsel sought to add another plaintiff, Margaret Benay Curtis-Bauer (“Curtis-Bauer”), an African American FA who left Morgan Stanley in November 2002, and to add, for the first time, class-wide race and color discrimination claims on behalf of a class of African American and Latino FAs and FA-Trainees from October 2002 to the present.[FN2] *See* Joint Stipulation Re: Filing of Sec. Am. Cmplt., ER 1208.

FN2. The class period was later defined as October 2002 through December 2007.

The Second Amended Complaint identified a single class that included both African American and Latino members, but both proposed class representatives were African American. For the first time, Ms. Williams was identified as a representative of African Americans (but not Latinos) for purposes of Title VII and Section 1981 claims. ER 1185-1186, counts 1, 2, 3, 4, 6, 8, 9. Curtis-Bauer was identified as a representative of both African Americans and Latinos, but solely for the Section 1981 claims. *Id*. The Complaint did not identify any Latino putative class representatives. ER 1186. On August 2, the *Jaffe* parties also informed the Court that the settlement in the *Augst-Johnson* gender class action had been preliminarily approved, notice had been sent to the class, and a fairness hearing date had been scheduled. ER 1213.

On August 30, 2007, before any further filing in or action by the *Jaffe* court with respect to the settlement, Morgan Stanley's Human Resources department sent an e-mail to Financial Advisors, entitled “A Message From Human Resources,” informing them of the “settlement of a race discrimination lawsuit filed on behalf of current and former African American and Latino” FAs and FA-Trainees. ER 1084. According to the e-mail, “details of the settlement will be made public upon the filing of the settlement papers with the U.S. District Court for the Northern District of California shortly.” *Id*. Morgan Stanley anticipated “a number of inquiries from FAs regarding participation in this settlement,” directed all such “inquiries to the attorneys who filed the case,” and provided full contact information for three sets of plaintiff's counsel. *Id*.

The *Augst-Johnson* settlement was approved by the D.C. Court on October 26, 2007. *See e.g*. ER 938. Days before, on October 22, 2007, plaintiff's counsel sought Class Certification and Preliminary Approval of the *Jaffe* proposed settlement. Dkt. Nos. 83, 85. The *Jaffe* proposed settlement included a fund of $16 million (to fund payments to class members, to the named plaintiff, for attorneys' fees, costs, and settlement expenses) and programmatic relief nearly

identical to that established by the *Augst-Johnson* gender class action settlement. Dkt 87-2 at 52 (Stlmt. at 36), ER 1106-19.

Named *Jaffe* plaintiff Denise Williams objected to the terms of the *Jaffe* race and color settlement and refused to serve as a class representative for African Americans and Latinos; she informed counsel of her intent to opt out and pursue her own discrimination claims. See Dkt. 87 at 2, n. 2. As a result, the sole representative of the class was Curtis-Bauer, an African American woman who was employed by Morgan Stanley for only the first month of the 5-year class period. *See Jaffe* Sec. Am. Cmplt., at 5.

II. Plaintiffs' Lack of Involvement In The Settlement Of Their Lawsuit

Morgan Stanley and plaintiff's counsel reached a settlement on July 23, 2007 during the final day of mediation, but no class representative or member knew of or consented to the terms. ER 850; ER 1374.

On July 30, 2007, Williams's lawyers e-mailed her a draft Second Amended Complaint that identified Williams as the only representative of the class of African Americans and Latinos. ER 420-421. 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 two groups' interests were not aligned.[FN3] ER 415 at ¶17. Thereafter, the lawyers attempted to locate another class representative. Williams Dec. at ¶8, ER 1345; Dermody Dec. at ¶13, ER 1375. Indeed, on August 1, the day before the settlement was announced and the Second Amended Complaint filed, plaintiff's attorneys contacted Morgan Stanley FA and manager Mary Evans (Moore group member, see below) and others about the case. ER 1061-1062.

> FN3. 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. Compare ER 1185-1186, to ER 425.

Within a day or two, Williams's lawyers told her that they "had found someone else" to represent Latinos. ER 415. Thus, the Second Amended Complaint named Williams a class representative for an "African American class," while Curtis-Bauer was added as a plaintiff and class representative for the "minority" class, which also included Latinos. *See e.g*. ER 1185-86.

Denise Williams did not participate in the negotiations of the settlement of the lawsuit that bore her name, and she rejected its terms. ER 416 at ¶10. Williams was not invited to attend any mediation sessions or allowed to participate in the negotiations of the class settlement. ER 414 at ¶5. Indeed, no class member attended any of the mediations or negotiation sessions that resulted in the settlement. ER 849-850.

As of August 2, 2007, Williams was not aware of the terms of any class settlement with Morgan Stanley. ER 415 at ¶ 6. Williams was also not aware of the participation of Curtis-Bauer, whom she has never met. *Id*.

Curtis-Bauer only became involved in the litigation after a settlement was reached, and her role was admittedly very limited. *See, e.g.,* ER 517-35. On November 27, 2007, Curtis-Bauer spoke by telephone with Mary Evans, whom she considered a friend and had known for over ten years. ER 521-22. 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. ER 523-24. 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. ER 524. Curtis-Bauer also told Evans that she thought the lawsuit only covered Morgan Stanley employees who worked in California. ER 523.

Curtis-Bauer gave her home phone number to Evans and asked that other members of the Moore Group call her, which a few 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. ER 517-19; 532-35. 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. ER 519; 534 at ¶5f. Roy and Mabon attended the District Court's December 3, 2007 hearing, and Roy testified to the admissions made during his conversation with Curtis-Bauer. 12/3/07 ER 51-54. Curtis Bauer did not attend any of the court proceedings in this case, including the fairness hearing to approve the settlement. *See generally* 12/3/07 Tr.; ER 1-103; 6/16/08 Tr.; ER 236-320.

III. Negotiations Between The *Moore* Group and Morgan Stanley

On August 6, 2006 - nearly a year before *Jaffe* class counsel announced the existence and settlement of their new class race discrimination claims - a large group of African American current and former Morgan Stanley FAs (the "Moore Group") informed the firm of their individual and class claims of race discrimination arising from Morgan Stanley's "nationwide pattern and practice of intentional race discrimination ... against African American Financial Advisors" and "employment practices that have a disparate impact on African Americans." ER 1141.

The Moore Group indicated its willingness to assist Morgan Stanley in addressing its systemic race discrimination and in exploring the possibility of resolving their individual and class claims without full-blown litigation. ER 950-951, 954, 963, 966-67, 971. The fourteen members of the Moore Group represented a broad cross section of Morgan Stanley employees, including current and former Morgan Stanley FAs of varying levels of production and tenure, applicants and producing managers. ER 1158-63; ER 548 at ¶15; ER 561-62 at ¶24. Members of the Moore Group had worked at over ten different Morgan Stanley offices across the country for a number of different managers. *Id*. Collectively, the Moore Group had 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. ER 549 at ¶16. Morgan Stanley claimed to be interested in proactively addressing its problems and entered into tolling agreements with the Moore Group's members so the parties could attempt to address these issues. *See, e.g*. ER 1150-1152.

On December 14, 2006, counsel for the Moore Group met with lawyers for Morgan Stanley in New York, including *Jaffe* and *Augst-Johnson* counsel Mark Dichter, in New York. Moore Compl, ER 1163-64 at ¶26. Additionally, between April 24, 2007 and June 26, 2007, the Moore Group mediated with Morgan Stanley representatives in Chicago and Washington D.C. regarding the systemic obstacles and patterns of discrimination facing African Americans at Morgan Stanley with the assistance of a well-respected professional neutral, Linda Singer. *See, e.g*. ER 547 at ¶9; ER 560 at ¶16.

Morgan Stanley led the Moore group to believe that the firm was interested in improving the condition of African Americans by reforming the policies, practices and hostile culture that disadvantaged African Americans and instituting meaningful, company-wide relief for African Americans. ER 951, 963, 966, 971. After Morgan Stanley settled the *Augst-Johnson* gender case, however, it began negotiating with the *Jaffe* lawyers to settle a yet unfiled class race discrimination claim as part of their dormant putative class action gender discrimination lawsuit. Mr. Dichter did not inform counsel for the Moore Group of its negotiations with the *Jaffe* plaintiff's counsel regarding class race discrimination claims until August 1, 2007, the day before the settlement was announced.

Due to the manner in which the *Jaffe* settlement was converted from a gender class and Morgan Stanley's conduct during their negotiations, the Moore Group was concerned that the *Jaffe* settlement would not benefit the putative class of African Americans. ER 951-952; 958; 966; 969; 971-73. None of the Moore Group were consulted during negotiation

of the claims of an entire class of African Americans or in crafting appropriate relief. ER 849-850. After learning of Morgan Stanley's duplicity, counsel for the Moore Group shared their concerns with counsel for the plaintiffs.

IV. Procedural Posture And Lower Court Proceedings

After learning of the proposed settlement, a group of over twenty class members (who ultimately grew to nearly thirty) sought to inform the District Court of their objections to the terms of the settlement and how it was reached and to gain additional information. *See* Dkt 95.

The Objectors filed objections to the certification of a class and preliminary approval of the proposed settlement because: the class was not adequately represented by an informed, conflict-free representative; the claims of the proposed class representative were not typical of those of the class; and the class settlement was not the result of informed, arms'-length negotiations. *Id*. The Objectors argued that the proposed settlement did not provide fair and adequate monetary or injunctive relief. *Id*. The Objectors also argued that the injunctive relief would actually harm African American class members and would make Morgan Stanley's discriminatory policies nearly impossible to challenge in the future. *Id*.

On December 3, 2007, the District Court held a preliminary hearing, during which it explained its own concerns with the proposed settlement, including Curtis-Bauer's adequacy and the large payment she was to receive, the terms of the proposed settlement, including Latinos and African Americans in the same lawsuit. ER 5-8.

The hearing was attended by counsel for the parties and for the Objectors. In addition, four of the Objectors, one current Morgan Stanley FA and three former Morgan Stanley FAs, traveled at their own expense to San Francisco from Chicago, Illinois and Los Angeles prepared to testify, explain the flaws of the settlement, and answer the Court's questions. *See* ER 548 at ¶13; ER 561 at ¶22; ER 38-50. The class representative, Curtis-Bauer, did not attend the hearing. *Id*.

The Court permitted testimony of two of the Objectors, Marion Tucker, a successful independent FA terminated by Morgan Stanley after a seven year career, and Brian Roy, a former Morgan Stanley FA and manager also terminated by Morgan Stanley. ER 38-54. Among other things, Mr. Tucker described his own experience, including his group's good-faith negotiations with Morgan Stanley that turned out to be a ruse, explained some of the shortcomings of the settlement, and testified that the fundamental problem facing the African American FAs was teams. Mr. Tucker was sharply questioned by the District Court.

Mr. Roy testified to his conversation with the sole class representative, Margaret Benay Curtis-Bauer. ER 51-54. The three Objectors who had spoken with Curtis-Bauer sought to testify or submit declarations regarding their separate conversations with Curtis-Bauer, during which she told them of her late involvement and recruitment by attorneys to the litigation, her own reservations regarding the settlement, her very limited involvement or interest with the settlement, and that she had not been an active participant and didn't want to be actively involved. *See, e.g*. ER 517-535. Curtis-Bauer told Ms. Evans that she did not understand that the settlement affected FAs outside California and that she had serious reservations about its efficacy. ER 522 at ¶6a; 524 at ¶6g. The District Court asked the Objectors for legal authority regarding why these hearsay statements should be admitted, which they provided after the hearing. *See* Dkt. 119.

The Objectors requested limited discovery to fully assess the terms of the settlement; to provide information essential to the court as part of its decision regarding class certification and the settlement; and to enable class members to consider their options and make informed decisions about the proposed settlement. *See generally* Dkt. 129. The Objectors sought discovery regarding the manner in which the settlement was negotiated, the terms of the programmatic relief, the materials that plaintiff's counsel had filed under seal, and workforce data in order to analyze and present

information regarding the conflict between African Americans and Latinos and a reasonable damages measure. *See* Id.

On December 12, 2007, the District Court issued an order accepting most of the parties' arguments in support of the settlement but did not grant preliminary approval, noting that some of the concerns it raised at the hearing were not assuaged. ER 346. The court therefore requested supplemental briefing and additional information in support of the settlement about (1) "how it can judge Curtis-Bauer's adequacy as a representative ... where Curtis-Bauer is receiving a significant additional payment in the form of settlement of her non-class claims, and she is relatively new to the suit," (2) the value of the programmatic relief, and (3) plaintiff's computation of losses to the class. ER 347, 351-352.

The Objectors sought leave to file *instanter* a 15 page submission addressing these questions and providing new evidence and law. The District Court denied the Objectors' motion for leave to submit a supplemental brief and warned of sanctions if the Objectors filed further submissions. ER 321. The District Court accepted the parties' submissions, however, which consisted of additional declarations and additional information filed under seal that was not available to the Objectors and the putative class.

On February 7, 2008, the District Court issued an order certifying the class, preliminarily approving the settlement, and denying Objectors any of the discovery they sought on behalf of the class or access to any documents filed under seal. ER 329.

At the final approval stage, 24 class members opted out of the settlement and 9 remained in but filed objections. ER 112. One of the opt-out Objectors was Denise Williams, the sole named plaintiff at the time the settlement was negotiated. Williams submitted a declaration that described her lack of involvement in negotiating the settlement and objection to its terms, among other things. ER 413-418.

After extensive argument at the fairness hearing, the District Court ordered an evidentiary hearing into adequacy of representation. ER 222-235. The District Court determined that the question of whether "the Settlement suffered from lack of adequate class representation" was a mixed question of law and fact. Id. at 11-12. Class counsel filed a motion for reconsideration, submitting various documents under seal and *in camera*.

On October 22, 2008, the District Court reconsidered and vacated its order for an evidentiary hearing, certified the class, and issued final approval of the class settlement. The court acknowledged that "[t]he unfortunate and likely unique procedural history of this case (such as simultaneous expansion of the claims and settlement, and Curtis-Bauer's late involvement) had already raised hard questions..." ER 107.

The Objectors filed their notice of appeal of the District Court's rulings on November 21, 2008. ER 354-55.

SUMMARY OF ARGUMENT

Courts uniformly hold that pre-certification class settlements must be reviewed under heightened scrutiny. *See, e.g., Staton v. Boeing Co.*, 327 F.3d 938, 952 (9th Cir. 2003). The facts of this case underscore the wisdom of this precedent and highlight the dangers present in pre-filing class settlements. Among other issues, this case raises the important legal question of whether pre-filing, without court involvement and appointment of class counsel, a class settlement may be reached when the only class representative rejects the proposed agreement. The unusual procedural and factual posture of this case are undisputed:

• The *Jaffe* case was a dormant gender discrimination class action converted to a race and color discrimination class action more than one year after filing and only after it lost the right to proceed to an identical gender class action filed on the same day;

• The case was settled before it was filed as a race discrimination class action and before any discovery occurred;

• No class member approved of the settlement before it was reached;

• No class member attended mediations or meaningfully participated in the settlement negotiations;

• Morgan Stanley sought out and chose to negotiate with *Jaffe* counsel rather than with a group of fourteen current and former Morgan Stanley FAs and managers alleging systemic race discrimination and with whom it was simultaneously negotiating;

• Former named plaintiff and class representative Denise Williams rejected the settlement after learning of its terms, refused to serve as a class representative and opted out of the lawsuit in order to pursue her individual race discrimination claims;

• After Williams objected, class counsel sought to locate another class member to serve as a class representative;

• The sole class representative, Margaret Benay Curtis-Bauer ("Curtis-Bauer"), was only contacted after the settlement was reached and days before the settlement was announced;

• Curtis-Bauer was last employed by Morgan Stanley in November of 2002; thus she worked for the Firm for only the first month, at most, of a class period that exceeds five years;

• Curtis-Bauer will receive payments of $25,000 as a class bonus and $125,000 for racial harassment "non-class claims" that she did not previously pursue and are time-barred;

• Curtis-Bauer is serving as the fiduciary of a class of 1,300 African-Americans and Latinos; she is not Latino, indeed, the *Jaffe* settlement binds and releases the claims of Latinos, but no Latinos participated as a plaintiff, class representative, or in the negotiations of the settlement;

• Including Denise Williams, well over thirty class members expressed dissatisfaction with the *Jaffe* settlement, including twenty-four class members who opted out and nine who objected.

Based on the record and as explained herein, the sole class representative, Curtis-Bauer, is not an adequate representative because of her late and limited role in these proceedings, her conflict of interest with the class based on the additional payments of $150,000 she will receive from the common fund in exchange for serving as class representative and ratifying the settlement after it was reached, and lack the knowledge or willingness to serve as an informed and engaged class representative. Williams was not permitted to adequately represent the class because an agreement was reached without her knowledge or consent. As a result, the class should not have been certified, and there was no need to consider the proposed settlement.

The Objectors also submit that the settlement resulting from this lack of meaningful class representation is not fair, reasonable and adequate to class members, particularly under the heightened standard of review applied to pre-certification class settlements. The District Court concedes the $16 million common fund is "low" in light of the earnings of class members. Moreover, the programmatic relief offered as the centerpiece of the lawsuit is largely a duplication of the injunctive relief ordered by a gender class action settlement and so cannot serve as consideration for this lawsuit and fails to reform the unique obstacles faced by African American class members at Morgan Stanley.

Finally, because the *Jaffe* lawsuit was settled before it was filed, no discovery occurred, and class members and the District Court lacked the objective information typical in order to evaluate the representation of the class and terms of the settlement. The District Court's decision to deny the Objectors' motion for discovery and access to information submitted in support was erroneous, as was its reversal of its own ruling ordering an evidentiary hearing into class representation issues. These rulings denied the class and the District Court information necessary to fairly evaluate the adequacy of the class representation and of the settlement.

STANDARD OF REVIEW

The standard of review in evaluating a decision on class certification, and whether a class settlement is fair and adequate, is abuse of discretion. *Staton v. Boeing Co.*, 327 F.3d 938, 953 (9th Cir. 2003) *In Re GM Corp. Engine Interchange Litigation*, 594 F.2d 1106, 1119 (7th Cir. 1979). Underlying rulings, questions of law, and applications of law to fact are reviewed *de novo*. *Harper v. Sheriff*, No. 08-3413, 2009 U.S. App. LEXIS 20057, *5 (7th Cir. Sept. 8, 2009); *Arreola v. Godinez*, 546 F.3d 788, 794 (7th Cir. Ill. 2008).

ARGUMENT

I. The Settlement Class Does Not Meet The Certification Requirements Of Rule 23

Rule 23 governs the rights and obligations of parties who desire to bind not only themselves but also to resolve the claims of others. To approve a precertification class settlement, therefore, a court must first ensure that the proposed class meets all of the requirements for Rule 23 certification. *In re General Motors Corp. Pick-up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 794 (3d Cir. 1995). The settlement class should not have been certified because it was not adequately represented by a class representative with claims typical of the class.

A. The Class Was Not Adequately Represented and Was Denied Due Process

A class action may be maintained only if "the representative parties will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). This requirement is "essential to meet due process standards, [and] must be satisfied at all stages of a class action, because the final judgment in a class action is binding on all those whom the court determines are members of the class." Newberg on Class Actions, Sect. 3:21. "The importance of determining adequate representation cannot be understated. The rule that the representative must fairly and adequately represent the class is one of constitutional magnitude." *Guenther v. Pacif. Telecom, Inc.*, 123 F.R.D. 341, 344 (D. Ore. 1987). "A class action representative serves as a fiduciary to advance and protect the interests of those whom he purports to represent; their interests are entrusted to the fiduciary's diligence and successful protection of the class depends upon the named plaintiff." *In re: Peregrine Sys. Sec. Litig.,* Civil No. 02cv870-J, 2002 U.S. Dist. LEXIS 27690, *37-38 (S.D. Cal. 2002). Basic notions of fairness and justice dictate that absent class members have an effective voice in proceedings that may extinguish their claims. *Id*.

Due process "requires that the named plaintiff *at all times* adequately represent the interests of the absent class members." *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 (1985) (emphasis added); Dkt. 206 at 4. In a settlement context, courts are bound to protect the interests of absent class members and must apply heightened scrutiny and attention to class certification requirements, where, as here, the parties reach settlement without adversarial class certification proceedings. *See Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 857 n.31 (1999) ("named representatives were not even 'named' [until] after the agreement in principle was reached . . . and they then relied on class counsel in subsequent settlement negotiations"); Dkt. 206 at 6.

1. Curtis-Bauer Does Not Adequately Represent The Class

Curtis-Bauer could not and did not adequately represent the class. In order to be considered adequate, a class representative must meet two fundamental requirements. First, her own interests must present neither an actual nor a potential conflict with those of the class. *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1020 (9th Cir. 2008) ("Examination of *potential* conflicts of interest ... is especially critical when the class settlement is tendered along with a motion for class certification."); *see also Payne v. Travenol Labs., Inc.*, 673 F.2d 798, 810 (5th Cir. 1982) ("a putative representative cannot adequately protect the class if his interests are antagonistic to or in conflict with the objectives of those he purports to represent."). Second, she must be willing and able to fulfill her fiduciary obligations to the class. *Hanlon*, 150 F.3d at 1020; *In Re Penegrine*, 2002 U.S. Dist. LEXIS 27690, *37. Curtis-Bauer cannot and did not meet these requirements for at least four reasons. First, Curtis-Bauer's personal interests, including the special payment to her of $125,000 for non-class, time-barred claims, create at least the appearance of a conflict with the interests of the class she purports to represent. Second, Curtis-Bauer is African American, not Latino, and therefore cannot adequately represent the particular interests of Latino class members. Third, Curtis-Bauer was employed for only the first month of the five-year class period, and she lacks adequate knowledge of the discriminatory practices challenged by the class. Fourth, Curtis-Bauer has demonstrated no willingness to fulfill her fiduciary obligations to the class.

a. Curtis-Bauer's Interests Conflict With Those Of The Class

Curtis-Bauer labors under an actual, and apparent, conflict of interest with the class she purports to represent. During the "no more than a week" of her "direct contributions to the [settlement] negotiations" (ER 774-775) Curtis-Bauer managed not only to ratify the common fund to compensate class members, but also to secure for herself a special payment of $125,000 for her "non-class claims." The remaining class members, on the other hand, will receive an average of $12,000. ER 117. In addition, Curtis-Bauer's special payment is to be paid from the common fund, thereby reducing class members' recovery for class claims, even though the special payment is for "non-class claims."

This special payment alone, without more, raises serious questions about Curtis-Bauer's adequacy as a class representative. In this settlement, however, there is more. Curtis-Bauer has not worked at Morgan Stanley since November 2002. Her discrimination claims expired four years later, in November 2006. Yet Curtis-Bauer stands to recover a special payment more than ten times greater than the recovery for other class members, despite the fact that her claims - unlike theirs - are time-barred. The size and nature of the additional relief granted to Curtis-Bauer in exchange for her after-the-fact ratification of the settlement precludes a finding of adequacy.

A class representative must not have interests antagonistic to or conflicting with the interests of unnamed class members. *Lerwill v. Inflight Motion Pictures, Inc.,* 582 F.2d 507, 512 (9th Cir. 1978). In "considering the involvement and knowledge of a prospective class representative, the Court must feel *certain* that the class representative will discharge his fiduciary obligations by fairly and adequately protecting the interests of the class." *Burkhalter Travel Agency v. MacFarms International, Inc.*, 141 F.R.D. 144, 154 (N.D. Cal. 1991).

In *Staton v. Boeing Co.*, 327 F.3d 938 (9th Cir. 2003), this Court recognized that named plaintiffs have a stronger incentive to maximize their own recovery than to maximize the shared fund from which unnamed plaintiffs' awards will be drawn. *Id*. at 977. Where named plaintiffs receive special awards "in addition to their share of the recovery, they may be tempted to accept suboptimal settlements at the expense of class members whose interests they are appointed to guard." *Id* at 977. Therefore, where, as here, the sole class representative negotiated a large and unique benefit for herself, it does not appear that the settlement is fair to all members of the class. *Id*. at 978 (reversing settlement approval because of "very large differential in the amount of damages awards between the named and unnamed class members").

Furthermore, even if Curtis-Bauer has no actual conflict of interest, she cannot be an adequate representative if the facts create even an *appearance* to the contrary. A proposed class representative is inadequate under Rule 23 if the circumstances suggesting a conflict of interest create "the appearance that [she is] not able to adequately investigate and prosecute [the] action on behalf of the absent members of the class." *In re Peregrine Systems, Inc. Securities Litigation*, No. 02-870, 2002 U.S. Dist. LEXIS 27690, *37 (S.D. Cal. Oct. 9, 2002). The disproportionately large special payment to Curtis-Bauer relative to her small possible recovery under the class fund formula, in combination with her eleventh-hour assumption of the named plaintiff role, creates the appearance of a conflict of interest and bar Curtis-Bauer from representing the class. *See Kayes v. Pacif. Lumber Co.*, 51 F.3d 1449, 1465 (9th Cir. 1995) (affirming the District Court's disqualification of class counsel due to the appearance of divided loyalties); *Swift v. First USA Bank*, No. 98-8238, 1999 U.S. Dist. LEXIS 19474, at *17 (N.D. Ill. Dec. 14, 1999) (proposed class representative was inadequate because she was "branded with the appearance of, and potential for impropriety, which is the primary" concern of the court, even though the court did not assume that she would "change a mere appearance into an actual occurrence").

Under the apparent conflict standard, Curtis-Bauer was not an adequate representative because she negotiated a $125,000 payment from the class fund for her "non-class" claims that are plainly time-barred. Without the class action, she would have no potential recovery on her untimely claims. Further, based on a fund allocation formula that is heavily weighted towards tenure, Curtis-Bauer, who was employed by Morgan Stanley for at most one month of the class period, will likely receive a nominal award for her class claim. If Curtis-Bauer had been presented as an advocate for the settlement without the extra $125,000 payment, plaintiff's counsel could have argued that she stood in the shoes of absent class members and made a decision for them that the diversity initiatives should be the centerpiece of the settlement. This did not happen, however. Unlike the class members, Curtis-Bauer was not required to balance her low recovery from the common fund against the benefits of the diversity initiatives, because she was guaranteed a large payment for her non-class, time-barred claims. This special payment is emblematic of the appearance of divided loyalties that is prohibited by Rule 23.

b. Curtis-Bauer Cannot Represent the Latino Members Of The Class

Curtis-Bauer cannot possibly represent Latino class members. She is African American, not Latino. In this case, it was essential that African Americans and Latinos have their voices heard and their interests and experiences represented at the negotiating table while monetary and programmatic relief were being designed. Given their unique experiences at Morgan Stanley (*See e.g*. Carter decl., ER 537-540), Latinos and African Americans were entitled to have their own representatives explain their respective concerns to class counsel and negotiate for their own, narrowly tailored relief. The lack of adequate representation by both Latinos and African Americans led to the unsound decisions to include both groups in a single class, rather than subclasses; to allocate a single common fund using a single, inequitable formula; and to establish programmatic relief not tailored to address the needs of each group. Thus, the absence of a Latino class representative in this case precludes a finding of adequacy of representation. *Payne v. Travenol Labs., Inc.*, 673 F.2d 798, 810-11 (5th Cir. 1982)(black males and black females were not interchangeable, so a black female could not be the sole representative for a class including black males); *see also Amchem Products, Inc. v. Windsor,* 521 U.S. 591, 627 (1997); *Bartelson v. Dean Witter & Co.*, 86 F.R.D. 657, 669 (E.D. Pa. 1980).

c. Curtis-Bauer Lacks Adequate Knowledge to Represent The Class

Curtis-Bauer was employed by Morgan Stanley for only the first *month* of a class period spanning more than five years, and she had no involvement in the investigation of the discrimination claims. Accordingly, she lacks knowledge of Morgan Stanley's practices during the vast majority of the class period and of the experiences of her fellow class members during that same time. As a result of her limited experience, she lacks sufficient knowledge of current practices necessary to critically assess whether the proposed injunctive relief is adequate to remedy the challenged discriminatory practices. A class representative is "not adequate to undertake the grave fiduciary responsibility of representing any class of victims of defendant's alleged employment discrimination" if she has been long absent from the defendant's employ and lacks knowledge of the practices at issue. *See hinder v. Litton Systems, Inc.*, 81 F.R.D. 14, 19 (D. Md. 1978); *see also Wofford v. Safeway Stores, Inc.*, 78 F.R.D. 460, 487 (N.D. Cal. 1978) (in employment discrimination cases "a court can and should insist on a named plaintiff who takes some active interest and has some ability to contribute to the action."); *Krim v. PCORDER.Com*, 210 F.R.D. 581, 587-89 (W.D. Tex. 2002) (denying class certification based on named plaintiffs due to lack of knowledge, involvement and interest in case).

Indeed, Curtis-Bauer has demonstrated an alarming lack of familiarity with this litigation. For example, she informed a class member that the class in this matter was limited to Morgan Stanley Financial Advisors employed in the state of California. ER 522. In a similar case, the proposed class representative was held inadequate because, among other things, he was unsure whether the class would include a nationwide group of plaintiffs or only those in his home state. *Burkhalter,* 141 F.R.D. at 146. Like the *Burkhalter* court, the District Court here could not "be certain that [the plaintiff] will adequately represent the proposed class. As plaintiff's counsel would be acting on behalf of an essentially unknowledgeable client, certifying a class . . . would risk a denial of due process to the absent class members." *Id*.

The need for a representative with knowledge of existing employment practices and their effect on class members is particularly crucial where, as here, no discovery has been conducted, plaintiff's counsel are relying on data and information selected by the alleged discriminator, and the settlement includes injunctive relief that purportedly would remedy future discrimination. Programmatic relief is the heart of civil rights enforcement, but this relief is severely compromised where the putative class representative lacks the knowledge or ability to fashion appropriate remedial measures to govern the discriminator's future conduct.

The District Court concluded that Curtis-Bauer was an adequate class representative in part because of her claim that she "suggested substantive changes that were ultimately incorporated in the settlement agreement." ER 327. A closer examination of Curtis-Bauer's claim, however, illustrates her lack of awareness of Morgan Stanley's current practices. Curtis-Bauer claims she had "two suggestions for what [she] thought were important issues for the class that had not been addressed" and that she "confirmed were in the final settlement agreement." ER 774 at ¶14. These were:
First, I suggested that Branch Manager compensation should be affected to ensure compliance with the terms of the settlement because money is what motivates Branch Managers. Second, for accounts where the company does not follow the power ranking due to an "exception," I suggested that the Branch Manager should be required to give other assets of equal value to the passed over broker to make up for the account that was redistributed. *Id*.

Morgan Stanley has included diversity-related performance measures in branch manager compensation since well before the filing of this lawsuit, however, so the settlement's vague language regarding manager compensation provides no value to the class. In addition, Curtis-Bauer's "suggestion" regarding power ranking exceptions was a provision included in the *Augst Johnson* settlement approved one year before the settlement approval in this case. Indeed, the settlement agreements in both cases contain verbatim provisions, neither of them prompted by Curtis-Bauer's suggestion. *See Jaffe* Settlement at VII.D.3.C (ER 157), and *Augst-Johnson* Settlement at VII.C.3.c. (ER 887)(both state "An individual financial advisor who does not receive a specific distribution as a result of an exception shall receive additional accounts in the same or subsequent distributions of approximately equal asset value").

d. **Curtis-Bauer Has Demonstrated A Lack of Interest In Performing Her Duties As Class Representative**

Curtis-Bauer has exhibited no willingness to fulfill her fiduciary obligations to the class. She admitted to other class members that she had not been an active participant and did not want to be actively involved. ER 519, 526, Dec. of M. Evans, B. Roy, M. Mabon. Further, Curtis-Bauer did not provide the Court with any opportunity to question her about this settlement or her adequacy as a class representative because she elected not to appear before the court at any of the hearings on settlement approval. Curtis-Bauer's statements and lack of involvement in the case provide strong evidence that she is simply a "true 'stand-in' part[y], selected by lawyers to fill a required role." *In re Quarterdeck Office Systems, Inc. Securities Litigation*, No. 92-3970, 1993 U.S. Dist. LEXIS 19806, *17-18 (C.D. Cal. Sep. 30, 1993).

Despite the competence of class counsel, the class is entitled to an adequate representative who will fulfill her fiduciary duties toward the class. This Court has cautioned that "the court must keep firmly in mind that the inquiry is not into the adequacy or fitness of counsel but into the adequacy of plaintiff." *In re Cavanaugh*, 306 F.3d 726, 733 (9th Cir. 2002). Thus, the presence and involvement of competent class counsel during negotiations cannot substitute for the active representation of a named plaintiff. *See In re Chiron Corp. Securities Litigation*, No. 04-4293, 2007 U.S. Dist. LEXIS 91140 (N.D. Cal. Nov. 30, 2007) ("When class counsel are not effectively monitored by the class representative, the result is indistinguishable from the situation in which an attorney serves as both class counsel and class representative.").[FN4]

> FN4. "Representatives should understand the action in which they are involved, and their 'understanding should not to limited to derivative knowledge acquired solely from counsel.' ... The competency of class counsel is not enough on its own; the representatives themselves must be familiar with the case." *Krim*, 210 F.R.D. at 587 (citations omitted).

Curtis-Bauer did not monitor counsel's conduct "throughout the litigation," nor did she play any role in the investigation, litigation, or negotiation of key aspects of the class settlement, including the amount of the common fund and the method of distributing it. These facts provide none of the necessary assurances that Curtis-Bauer fulfilled her fiduciary duties to the class during the most critical phase of this short litigation.

2. The Class Settlement Was Reached Without Client Approval

This case presents a fundamental legal issue: whether due process and Rule 23 authorize lawyers to settle a class action lawsuit that has not been filed, without the consent of a client. The Objectors respectfully suggest that clients are essential to Rule 23 and that the class was irreparably and unconstitutionally short-changed when lawyers negotiated a settlement of class claims without the approval of their only client. To allow otherwise would sanction the wholesale settlement of claims without requiring a bargained-for exchange between the real parties in interest. Worse, it would create an incentive for defendants, in particular employers, to "shop" for class action lawyers in order to cheaply resolve important, valuable civil rights claims and immunize the defendants and their policies in the future.

It is undisputed that when the settlement was reached, no class member or representative knew of or approved its terms. At that time, Denise Williams was the only client and putative class representative, and she learned of the settlement terms after the fact. She objected and informed putative class counsel that she would not serve as a class representative. At that point, counsel had no client and no further authority to act on behalf of the putative class. The Objectors submit that pre-filing and pre-certification, there is no class counsel, there is only counsel for a single plaintiff. Where that plaintiff is not fully informed, and does not approve the settlement once she is informed, counsel is not permitted to enter into an agreement on behalf of a class over that client's objection and go in search of a new plaintiff. Putative class counsel lacked authority to settle class claims when neither their client nor any class member agreed to the terms. The District Court should not have accepted the after-the-fact ratification of the settlement.

Unable to find that Curtis-Bauer alone was an adequate class representative, given her late entry into the case, the District

Court found that the class was adequately represented by both Ms. Williams and Curtis-Bauer. ER 107-108. But neither of them could or did adequately represent the interests of the absent class members in this case.

B. Curtis-Bauer's Claims Are Not Typical Of Those Of Class Members Because Of Her Special Payment For Non-Class Claims And The Conflict Between African American And Latino Class Members.

The settlement class does not meet Rule 23(a) typicality because Curtis Bauer's claims are not typical of those of the class for at least two reasons. First, the $125,000 payment that Ms. Curtis-Bauer is receiving from the class fund for her time-barred, non-class harassment claims is many times the average recovery class members will recover for their race discrimination class claims. Ms. Curtis-Bauer's "other" individual claims thus predominate over her race discrimination claims, so they cannot be typical of the class. *See, e.g., O'Neal v. Wackenhut Servs. Inc.*, No. 03-397, 2006 U.S. Dist. LEXIS 34634, at *57 (E.D. Tenn. May 25, 2006) (refusing to certify a class because the named plaintiffs' claims were noticeably weaker than those of most class members and were therefore atypical).

Second, the race discrimination claims of Curtis-Bauer, an African-American, are not typical of the claims of Latino class members. *See, e.g., Bartelson v. Dean Witter & Co.*, 86 F.R.D. 657, 669 (E.D. Pa. 1980) (denying class certification for minority class, white female class representative's claims were not typical of the claims of blacks and other minority groups); *Payne v. Travenol Laboratories, Inc.,* 673 F.2d 798 (5th Cir. 1982).

The District Court found Curtis-Bauer to be a suitable representative for and her claims typical of those of Latinos because plaintiffs alleged that both Latinos and African Americans were subjected to the same discriminatory practices. ER 347-49.

The District Court dismissed out of hand the evidence presented by Objectors of antagonism between African Americans and Latinos on the impact of these practices, among other things. Indeed, class counsel conceded, upon court questioning, that Morgan Stanley's workforce data revealed African Americans suffered worse outcomes than Latinos in representation, compensation and attrition. ER 17. The Objectors submitted expert and class member declarations regarding how Morgan Stanley's challenged policies affected African Americans and Latinos differently and the effect of a single allocation formula from a single fund. *See, e.g.,* ER 505-50; 511-15; 537-39; *www.morganstanley.com/about/press/articles/4281.html*.

Moreover, although the court was incorrect that Objectors had made "no showing" of a conflict or reasons why Latinos and African Americans should not receive identical treatment or be represented by Curtis-Bauer, the court *denied* Objectors the discovery they sought to demonstrate this conflict through Morgan Stanley's own policies and workforce data, as well as access to information submitted *in camera* on this topic. A proper analysis of this data and information would have revealed the divergent experiences of the two groups. Under these circumstances, typicality cannot be met in a single class of Latinos and African Americans.

II. The Settlement Did Not Meet The Standard For Preliminary Approval

To grant preliminary approval, a District Court must determine that a proposed settlement "is based upon findings that (a) the negotiations occurred at arm's length; (b) there was sufficient discovery; (c) the proponents of the settlement are experienced in similar litigation; and (d) only a small fraction of the class objected." *Livingston v. Toyota Motor Sales, USA, Inc.,* No. C-94-1377, 1995 U.S. Dist. LEXIS 21757, at *24 (N.D. Cal. June 1, 1995), adopted *Wolf v. Toyota Motor Sales, USA, Inc.,* No. C-94-1377, 1997 U.S. Dist. LEXIS 16457, *4 (N.D. Cal. Sep. 17, 1997). The District Court erred in granting preliminary approval of the settlement where the negotiations did not occur at arms' length and no formal discovery took place, resulting in an inadequate and unfair settlement, to which a substantial number, over twenty at the preliminary approval stage, of class members objected. *See e.g*. ER 38-50; 316; 413-17; 470-73; 537-574; 949-74; 995.

A. The Record Establishes This Was A Settlement In Search of A Class Representative, Not An Arm's Length Negotiation Between Parties.

The record reveals that the settlement was not negotiated by interested, informed parties at arm's length. The *Jaffe* lawsuit was filed as a class action gender discrimination lawsuit, and converted to a race and color class case only after a competing lawsuit was certified and settled. The *Jaffe* settlement was announced the same day the parties sought to amend the complaint to first include class claims of race and color discrimination, some 14 months after the lawsuit was originally filed.

None of the putative class members or their representatives (other than counsel) participated in any negotiations of the *Jaffe* settlement, or authorized the lawyers' agreement with Morgan Stanley before a settlement was reached. When Denise Williams learned of the settlement reached by her lawyers, she objected, then counsel went in search of a new class representative to ratify the agreement. ER 1375. Williams' decision to relinquish her class representative status, lodge objections and opt out of her own lawusuit, foregoing a $125,000 guaranteed payment, casts doubt on the fairness of the negotiations and their result.

Curtis-Bauer, added after Williams received the draft complaint on July 30, played no role in the negotiations resolving the claims of the class she seeks to represent or the agreement reached July 23. And no Latino putative class member participated in the case at any time.

Other putative class members, including the sole class representative, were not contacted until the deal was done. For example, on August 1, 2007, the night before the *Jaffe* settlement was announced, Mary Evans, a Financial Advisor and Assistant Branch Manager of the Menlo Park Morgan Stanley office, received a phone call from a Lieff Cabreser attorney who appeared to be attempting to solicit her as a named plaintiff in the *Jaffe* case. ER 1061-1062. Curtis-Bauer, like Ms. Evans, was contacted only *after* the settlement was reached by Morgan Stanley and counsel for the *Jaffe* plaintiffs.

Morgan Stanley's decision to negotiate with the *Jaffe* plaintiffs' counsel rather than the Moore Group is unsurprising. Morgan Stanley was not interested in a fair resolution negotiated at arm's-length with actual class members that would benefit African Americans and result in meaningful change at the Firm. Morgan Stanley was well aware that the Moore group would not agree to one-sided terms and insufficient relief for African Americans, nor would they agree to release the rights of Latinos, and would litigate rather than accept relief that would not benefit other African Americans but would restrict their rights. Thus, Morgan Stanley therefore offered the *Jaffe* counsel the option of converting its the gender case into a race class actions ssettlement on virtually identical terms as the *Augst-Johnson* settlement.

Plaintiffs' counsel relied on Morgan Stanley to garner support for the settlement. After the *Jaffe* Settlement was reached, Morgan Stanley sent an e-mail to all class member employees with the names, firms and contact information of plaintiffs' attorneys and directed class members to call plaintiffs' counsel with questions.[FN5] ER 1084. The limited support by a few class members *after* the settlement was reached does not diminish the importance of the lack of class member involvement and approval during the negotiation of the settlement.

> FN5. It is hard to imagine another circumstance under which an employer would willingly distribute contact information for three of the largest plaintiffs' law firms to a large group of employees.

After the Objectors objected to the settlement, plaintiffs' counsel continued its search for named class representative plaintiffs. On October 30, 2007, an attorney from Lieff Cabreser contacted class member Marshell Miller and asked whether he would be interested in serving as a class representative and on November 8, 2007, asked whether he would write a letter to the district court supporting the settlement. ER 465-68. Miller was not provided with complete

information or told about the Objectors or that one of the named plaintiffs rejected the settlement. ER 466. Miller declined to serve as a plaintiff and instead objected to the Settlement. ER 467; 971-74.

B. No Formal Discovery Was Conducted And Morgan Stanley Proved Itself Unreliable By Misrepresenting Its Employment Practices And Failing To Disclose The Nature Of The Moore Group's Claims.

The *Jaffe* Settlement was reached without any formal discovery and without any meaningful involvement of class members. Although the parties contend that Morgan Stanley provided certain information as part of the mediation process, including workforce data, this information was not produced under the Court's discovery rules or made available to class members. When combined with the lack of involvement of class members in the mediation and settlement process, this discovery failed to provide sufficient basis for an appropriate settlement.

Further, it does not appear that Morgan Stanley provided the *Jaffe* plaintiffs with meaningful information to make decisions on behalf of unnamed class members. For example, Morgan Stanley did not inform plaintiffs or their counsel about the existence of the Moore group or the nature of their claims.[FN6] Morgan Stanley also misrepresented its teaming policies to class counsel, which had a deleterious impact on the settlement. *See* discussion at IV.B. *infra*. Morgan Stanley's failure to disclose this information undermines the reliability of any information exchanged informally.

> FN6. Objectors accept that class counsel was not aware that Morgan Stanley was negotiating with a large group of current and former African American FAs and managers prior to and during the period in which class counsel was negotiating the *Jaffe* class settlement. Objectors do not, however, understand why class counsel, after learning of Morgan Stanley's duplicity and that the Moore group had dedicated substantial time and effort to addressing Morgan Stanley's discriminatory policies and culture, would not want to interview and work with the Moore group to understand their experiences and perspectives on the programmatic relief and potentially improve the settlement.

III. The Settlement Is Not Fair, Adequate Or Reasonable

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. *Simer v. Rios*, 661 F.2d 655, 664-66 (7th Cir. 1981). Pre-certification settlements also warrant extra scrutiny because they present unique temptations and opportunities for collusion. *See, e.g., In re General Motors Corp.*, 55 F.3d at 797 (requiring that settlement proponents show that the compromise met a higher standard of fairness where negotiations occurred before certification). Clearly, a settlement reached before a lawsuit was even filed merits the greatest possible judicial care to protect absent class members.

A. The Settlement Fund Does Not Provide Fair or Adequate Compensation To Class Members Harmed By Morgan Stanley's Race Discrimination

The District Court admitted that the Settlement's monetary relief to class members could “undoubtedly be greater” and is “not large considering the incomes involved.” ER 8; 334. Morgan Stanley seeks to release the claims of approximately 1,300 African American and Latino Financial Advisors and Trainees for a settlement fund of $16 million, which will not provide adequate compensation to the victims of the Firm's systemic racial discrimination.

The $16 million fund is substantially less than amounts recovered for class members in other cases in the retail brokerage industry,[FN7] including cases against Morgan Stanley. The *Augst-Johnson v. MSDW* gender discrimination class action was settled for $46 million. *See also EEOC/Schiefflin v. MSDW*, Case No. 01-cv-8421 (S.D.N.Y.) (class of 340 women recovered $54 million, with $40 million to be allocated to the class). Indeed, because of the high earnings and earnings potential in the financial services industry, even single plaintiff and non-class discrimination claims have been resolved for significantly higher settlements or resulted in substantial verdicts for discrimination plaintiffs. *See e.g. Dodson v. Morgan Stanley*, Case No. 06-cv-5669 (W.D.Wa.)($750,000 settlement in single plaintiff sex discrimination case); ER 730, *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); ER 728, *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); ER 633-73 (discrimination awards for Merrill Lynch FAs ranging from $210,000 to $2.2 million).

FN7. *See, e.g., Cremin v. Merrill Lynch*, Case No. 96 C 3773 (N.D. Ill.) (900 claimants recovered over $225 million); *Martens et al. v. Smith Barney,* Case No. 96 C 3779 (S.D.N.Y.)(over $100 million)

The District Court found the settlement adequate in part because the per class member payouts were comparable in the *Augst-Johnson* and a more recent *Smith Barney* sex discrimination settlements. ER 117. But the race and color claims at issue in this lawsuit under Section 1981 have a longer class period and are more valuable than the Title VII gender discrimination claims in those lawsuits because Section 1981 has a longer statute of limitations (four years as compared to Title VII's 300 days) and no cap on compensatory damages. In addition, as class counsel conceded, the outcomes for African Americans at Morgan Stanley are worse than those for Latinos and whites. ER 17.

The inadequacy of the Settlement's financial provisions is also demonstrated by the actions of the named plaintiffs. One of the best tests of the fairness of a proposed settlement is whether the named plaintiffs and class representatives will agree, without added incentives or side-deals, to participate in the settlement on the same terms as other class members. Plaintiff Williams objected to the proposed settlement and concluded it would not provide sufficient relief for her legal claims. She lodged objections with the District Court and opted out of the *Jaffe* settlement's financial terms in order to individually pursue her claims of discrimination in a separate lawsuit in Michigan. *Williams v. Morgan Stanley* (E.D. Mich.); ER 413-418; 1344-48. Plaintiff Curtis-Bauer has not been forced to stand in the shoes of the class in order to gauge the fairness of the Settlement, as she will receive an additional $150,000 in payments *from the fund* that are not available to other class members. Without these additional payments, it is unlikely that Curtis-Bauer would have accepted this Settlement as fair to her or on behalf of absent class members.

The District Court found the monetary relief adequate based on class counsel's representation that the $16 million fund constituted 43% of the "maximum" of $36 million the class could recover if it prevailed on all of the class claims. ER 13,117,333.[FN8] The court reasoned that "a sizeable discount is to be expected in exchange for avoiding the uncertainties, risks, and costs that come with litigating a case to trial." ER 334; 351. But the common fund is based on a damages calculation that does not measure claims class members must release or damages recoverable as a matter of law. A settlement fund is not adequate if it represents *too* low a percentage of the recoverable damages such that the risk of litigation does not outweigh the advantages of the settlement.

FN8. Class counsel represented to the court that "if we run the table, we get class cert, we win on liability, we get all of the damages we're seeking we would get about $36 million." ER 13.

The civil rights laws provide full relief for victims of discrimination, including back pay, front pay, emotional distress, and punitive damages. *See e.g. Albermarle Paper Co. v. Moody*, 422 U.S. 405, 419 (1975); *EEOC v. O&G Spring,* 38 F.3d 872, 880 (7th Cir. 1994); *Williams v. Pharmacia*, 137 F.3d 944, 951-952.

Class counsel undervalued the damages to the class by relying on a compensation shortfall valuation that captured only wage differentials for current employees, thus measuring earnings disparities only for the period during which class members worked at the firm.[FN9] ER 779; ER 511-15. As a result, the damages model does not value class members' front pay losses, or emotional distress damages, which could have been substantial given that Section 1981 has no caps on emotional distress or punitive damages. *See Zhang v. Am. Gem. Seafoods, Inc.*, 339 F.3d 1020, 1044 (9th Cir. 2003); 42 U.S.C. § 200e-5(g)(1)(same).

> FN9. Objectors were denied discovery of class counsel's damages model or workforce data so they could prepare their own damages valuation but presented the declaration of statistician Dr. Jerry Goldman, as to the shortcomings of the shortfall analysis. *See* Goldman Dec. at ER 514-515.

Nor does the shortfall analysis value the claims of class members denied promotions or terminated as a result of discrimination, although they are required to release these claims under the settlement. ER 215. The District Court acknowledges that class members must release claims not measured the shortfall analysis, but claims they are eligible for bonus points in the claims process if they were terminated. ER 121. The weighting for these claims under the settlement formula is quite small compared to the overall point potential, however (*see* Dkt. 250-3 at 28), and does not address the more fundamental question that the potential recovery figure upon which overall reasonableness of the common fund was judged was undervalued by excluding these damages.

Finally, a single allocation formula for the common fund is unfair because it will lead to inequitable recovery for African American FAs. The Settlement calls for distribution of the common fund to both African American and Latino FAs pursuant to the same allocation formula. In an allocation formula that is based primarily on tenure, earnings and tenure disparities that exist among the two groups render the decision to base their recovery on the same formula wholly unfair given the inequities that will surely result. Again relying on information submitted under seal and not made available to the class, the District Court held that the earnings and other disparities between African Americans and Latinos was "not so great that it would have be unfair or inappropriate to treat them in a similar fashion for monetary relief" or to create a conflict of interest. Dkt. 158 at 13.

The District Court further held that any disparity could be cured through the earnings regression analysis portion of the settlement calculation.[FN10] However, only a small portion of the allocation formula, 15%, is determined based on these disparities. Dkt. 250-3 at 13, ¶8. Thus, although African Americans were harmed the most by Morgan Stanley's discrimination, the terms of the proposed settlement may result in Latino FAs recovering a greater percentage of the common settlement fund and, frequently, larger awards than African American class members.

> FN10. The District Court made this fairness determination based on information that was filed *in camera*, and to which the class did not have access. *See* Dkt. 158 at 13.

The allocation formula largely rewards longevity and thus disadvantages African Americans, who have a much higher attrition rate than do Latinos. Notice, Dkt. No. 250-3, at 13, ¶ 8. Thus, most African American class members are likely to have worked at Morgan Stanley for far fewer weeks than their Latino counterparts and so will not fare as well in competing for a share of the common fund.

The substantial damages that result from termination are often career-ending and may eclipse disparities suffered by those who remain at the firm, even if they do earn lower wages than whites. As Objectors' expert Dr. Goldman explains in his declaration:

[I]n the example of point calculation (p. 103) provided in the settlement document, about two-thirds of an 85% component (the "claim form survey") of the allocation formula, or nearly 57%, is tied to this service time. The assumptions imply that service time would be smaller on the average for African Americans than for Latinos, which

would propagate to a smaller calculated award to these individuals whose earnings potential at the onset of hire was no less equal. Consequently, the number of weeks worked time of service component within the claim form completes a vicious circle tied to race.
Dkt. 145-1, at ¶ 6.

B. Because Of The Lack Of Class Member Involvement, The "Programmatic Relief Is Not Fair And Adequate to Remedy Morgan Stanley's Race Discrimination But Will Perpetuate and Institutionalize This Discrimination

Acknowledging that the common fund established by the settlement is low, the parties and the District Court focused on the programmatic relief as the "centerpiece" of the settlement. But the programmatic relief is not the product of arm's-length negotiations in this case, as it is "nearly identical" to the programmatic relief established in the *Augst-Johnson* gender discrimination settlement.[FN11] ER 328 (court calls *Augst Johnson* settlement "nearly identical").[FN12] Indeed, under the *Augst-Johnson* consent decree, Morgan Stanley is legally obligated to implement the vast majority of this relief regardless of the outcome of the *Jaffe* case. *See, e.g.,* ER 882-96; ER 151-167. As a result, the programmatic relief cannot serve as consideration to extinguish the claims of 1,300 African American and Latino class members.

FN11. *See* ER 7-8 ("From my reading of the settlement agreement and the party's papers, it seems to me that. . . this settlement does not add dramatically more relief [to the *Augst Johnson* settlement]"); *See* Dkt. 108, Dec. of Irwin Goldstein, at 3.

FN12. Almost all of the provisions simply changed the word "women" to "African Americans and Latinos." *Compare, e.g*. Section VII.C.4.b. of the Augst-Johnson Settlement, ER 888 with Section VII.DAb. of the *Jaffe* Settlement, ER 158. Nevertheless, the District Court ultimately determined the *Jaffe* settlement was not a "carbon copy" of *Augst-Johnson* based on a few additions, which hardly warrant approval. ER 350. For example, one new provision relates to hiring practices, but does not require Morgan Stanley to hire a single African American, only to use its best efforts to improve; nor does this benefit the class, which did not bring a hiring claim. Similarly, Morgan Stanley commits to an undefined diversity component to management compensation, but this has long been a policy at the firm.

Moreover, the programmatic relief suffers from the same flaw that precludes class certification. It was not negotiated by or with the assistance of knowledgeable class members. Objectors respectfully submit that they would not have accepted the same injunctive relief designed for women but would have designed relief designed to address specific issues facing African Americans. The Objectors explained to the District Court many of the ways in which the settlement would have been different had a group of committed and informed class members been at the negotiating table, in their papers and during the Fairness Hearing. ER 47; *see also e.g*. Dkt. Nos. 95, 161.

Most notably, the Objectors would have insisted upon meaningful reform of Morgan Stanley's policies regarding teams or partnerships of FAs, the fundamental problem facing African Americans at Morgan Stanley. *See* ER 44 (Objector Marion Tucker stating that he would "make it mandatory for African Americans to be included in teams" in every Morgan Stanley branch office. The settlement not only fails to reform 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.[FN13]

FN13. 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, ER158, and (2) allowing FAs to garner points under the Power Ranking system for assets received through partnerships,

and not developed from their own efforts, *id*. Because African-Americans do not receive these "gifts," they are at a competitive disadvantage.

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. ER 95-96 (emphasis added).

Morgan Stanley did not provide accurate information about teams 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*.

The EEOC and at least one federal court have determined that Morgan Stanley does have teaming policies and that those policies may constitute discrimination under the civil rights laws. In July 26, 2006, after an investigation, the EEOC found reasonable cause to believe that Morgan Stanley's policy of allowing FAs to subjectively choose partners for lucrative agreements resulted in a female FA being unlawfully denied a partnership because of her sex. ER 460-463. 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).

IV. The Court Erred In Denying Objectors' Request for Discovery To Assess The Class Settlement And In Reversing Its Own Order For An Evidentiary Hearing

A. Discovery Would Have Provided Necessary Information To The Class And The Court And Demonstrated That Rule 23 Was Not Met And That The Settlement Was Unfair And Inadequate

In order to provide the District Court and class members with crucial information necessary to fully assess the proposed class and settlement, Objectors moved the District Court to discover: additional information regarding the programmatic relief touted as "the centerpiece" of the lawsuit, including the actual power ranking filed under seal with the court; additional information regarding the involvement and claims of the class representative; and Morgan Stanley's workforce data provided to class counsel so that Objectors could assess the appropriateness of treating African Americans and Latinos, analyze how the proposed injunctive relief would affect class members, and prepare a reasonable damages estimate to assess the settlement's monetary relief.[FN14] *See, e.g. ER 780-98*.

FN14. Objectors submit that even the undisputed record required denial of class certification and approval of the settlement.

Numerous federal District Courts have permitted objectors to a proposed class settlement to seek additional discovery where, as here, that discovery is necessary for the court to properly assess the fairness of the settlement or for objectors to participate fully in fairness hearings. *See, e.g., Hemphill v. San Diego Association of Realtors, Inc.*, 225 F.R.D. 616

(S.D. Cal. 2004); *In re Domestic Air Transportation Antitrust Litig.*, 144 F.R.D. 421, 425 (N.D. Ga. 1992)(granting in part objectors' motion to compel additional discovery); *In re Lorazepam and Clorazepate Antitrust Litig.*, 205 F.R.D. 24, 26-28 (D.D.C. 2001) (same); *Lipuma v. Am. Express Co.*, 406 F. Supp. 2d 1298, 1309 (S.D. Fla. 2005) (intervenor-objectors to a proposed class settlement were allowed to conduct discovery, including depositions, for five months prior to the final fairness hearing); *In re Gen. Motors Corp. Engine Interchange Litig.*, 594 F.2d 1106, 1124-25 (7th Cir. 1979) (court abused its discretion in refusing to allow objectors to conduct discovery into the class negotiation process where there was a credible concern that defendant had shopped for desirable class counsel). Additional discovery is consistent with the heightened scrutiny applied to pre-certification settlement classes to protect the interests of class members who were not notified of the action and therefore lacked the opportunity to be heard during negotiations. *See, e.g., Simer*, 661 F.2d at 664-66; *In re General Motors Corp.*, 55 F.3d at 796.

The District Court denied this discovery, stating that Objectors "have had a meaningful participation in the settlement proceedings, the Court has sufficient facts before it to intelligently evaluate the settlement, and discovery would cause unnecessary delay." ER 323. Respectfully, the District Court was mistaken. The District Court invited the parties to present additional information in support of the settlement, including information presented under seal and *in camera*, but rejected Objectors' attempts to submit relevant information and ignored or summarily dismissed most of the evidence they did submit. ER 321 at n.1; 333 (denying Objector's brief regarding questions posed by court. The discovery sought would have allowed meaningful understanding of the Settlement and how it was reached and provided information essential for the District Court to make a fully informed evaluation of the settlement. This discovery was readily available to the parties, and much of it had already been provided to class counsel. If necessary, the District Court could have promptly held an evidentiary hearing, complete with witness testimony.

The court's denied this discovery although the Objectors plainly met the factors set forth in the case upon which the court relied, *Hemphill v. San Diego Assoc. of Realtors, Inc.*, 225 F.R.D. 616 (S.D. Ca. 2001). The *Hemphill* court held that the criteria "relevant to the court's decision of whether or not to permit discovery are the nature and amount of previous discovery, reasonable basis for the evidentiary requests, and the number and interests of objectors." *Id* at 620. Each of these factors weighs in favor of discovery. First, no formal discovery occurred in the lawsuit settled before it was filed. Second, the Objectors explained in detail their well-founded basis for their discovery requests, based on the first-hand knowledge of and experience with Morgan Stanley and its policies by current and former employees and managers, admissions by the named plaintiff and counsel regarding the abbreviated and unusual settlement process, and counsel's experience with the retail brokerage industry and similar cases. Finally, the motion was supported by over 25 Objectors deeply interested in protecting the class of African American FAs, including fourteen who had engaged in extensive negotiations with Morgan Stanley on many of these same issues.

Under the heightened duty of review in a pre-filing settlement, the District Court erred in denying the Objectors discovery into the negotiations process and matters relevant to the settlement. Federal District Courts in California and elsewhere have denied preliminary approval of class settlements where the settlement was reached prior to class certification and discovery was inadequate to allow the court to evaluate the fairness of the settlement to all class members. *See, e.g., Acosta v. Trans Union LLC*, 243 F.R.D. 377, 397 (CD. Cal. 2007) (rejecting motion for preliminary approval, noting that "courts are inherently skeptical of pre-certification settlements, precisely because such settlements tend to be reached quickly before the plaintiffs' counsel has had the benefit of the discovery necessary to make an informed evaluation of the case and, accordingly, to strike a fair and adequate settlement."); *Reynolds v. Beneficial Nat'l Bank*, 260 F. Supp. 2d 680, 695 (N.D. Ill. 2003) (refusing to approve a proposed class settlement where discovery was inadequate). The class and the court were entitled to full and accurate information in order to reach their respective decisions about class representation and the fairness of the settlement.

B. An Evidentiary Hearing Was Warranted And Would Have Demonstrated That The Class Was Not Adequately Represented

After former named plaintiff Denise Williams came forward and the record confirmed the settlement was lawyer-driven,

the District Court ordered an evidentiary hearing to assess the nature and extent of class member involvement. ER 234-35. The court reversed its order and certified the class based on information submitted *in camera* by class counsel, although it conceded that the materials submitted by Williams and her former counsel presented a factual dispute. ER 107-109. The District Court's decision to resolve these credibility issues in favor of class counsel and without an evidentiary hearing was in error.

CONCLUSION AND RELIEF SOUGHT

Objectors respectfully seek reversal of the District Court's orders denying Objectors discovery and access to materials filed under seal and *in camera*, granting preliminary and final certification of the proposed class and approval of the class settlement, and vacating its order for an evidentiary hearing into the involvement of class representatives in settlement negotiations.

Daisy JAFFE and Margaret Benay Curtis-Bauer, Plaintiffs-Appellees, v. Jonathan GLOVER, Latrissa Gordon, Marilyn White, Peter Meme, Marshell Miller, Jerome Senegal, Hubert Stalling, Lanta Evans-Mott, Carlton McDowell, Sarah Nyamuswa and Theron Cyrus, Objectors-Appellants, v. Morgan Stanley & Co., Inc., Defendant-Appellee.
2009 WL 4921503 (C.A.9) (Appellate Brief)

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