United States Court of Appeals, Ninth Circuit.
Daisy JAFFE; 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; Theron Cyrus, Objectors - Appellants,
v.
Morgan Stanley & Co., Inc., Defendants - Appellees.
No. 08-17599.
January 28, 2010.

Appeal from Entry of Final Judgment by the United States District Court for the Northern District of California, D.C. No. 3:06-cv-03903-TEH, Entered on October 22, 2008

Brief of Plaintiffs - Appellees

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MISCELLANEOUS

***1** *JURISDICTION*

The district court had jurisdiction under 28 U.S.C. §§ 1331, 1343, and 1367, and 42 U.S.C. § 2000e-5(f)(3). This Court has jurisdiction under 28 U.S.C. § 1291. The district court entered final judgment on October 22, 2008, and Objectors filed a timely notice of appeal. ER 104-218, 219-21, 354.

LOCAL RULE 28-2.6

Plaintiffs - Appellees have no knowledge of any other pending cases before the Court related to the issues herein.

ISSUES PRESENTED FOR REVIEW

1. Whether Judge Henderson abused his discretion by granting preliminary approval to a settlement of race discrimination claims, negotiated at arms' length by experienced counsel after filing a class charge of race discrimination with the EEOC and then conducting seven months of factual investigation and legal analysis, when the settlement, reached with the assistance of an experienced neutral mediator, provides strong injunctive and monetary relief, with relatively modest attorneys' fees, such that it easily falls within the range of possible settlement approval.

2. Whether Judge Henderson abused his discretion by certifying a settlement class of African-American and Latino Financial Advisors and Registered Financial Advisor Trainees affected in the same manner by a common policy, when the extensive evidence before him provided a solid basis for his express findings that all of the requirements of Rule 23 were satisfied, including that the class representative was adequate.

3. Whether Judge Henderson abused his discretion by granting final approval to a settlement providing comprehensive injunctive relief and $16 million in monetary relief to a class of approximately 1,300, when he applied the correct legal standard and expressly found that the factors enumerated by the Ninth Circuit all supported final approval:

a) “Plaintiffs would face considerable risks were they to proceed to trial” because Morgan Stanley's allegedly discriminatory policies were “objectively neutral,” and were, in any event, only one of a number of factors affecting compensation, ER 111;

b) “[t]he settlement was reached after extensive investigation, analysis, and arm's-length negotiation,” *id.*;

c) “Plaintiffs' counsel have extensive experience and experience not only with class action discrimination cases, but in litigating employment and discrimination cases against defendants in the financial services industry,” *id.;*

d) the reaction of the class members “weigh[ed] in favor of approval” because only 9 lodged objections and 24 opted out, while 422 submitted claims, ER 112;

e) the injunctive relief provided “represents an expansion of the relief provided in the settlement of a parallel gender discrimination case against Morgan Stanley ... and is substantive, meaningful, and valuable to the class,” ER 112-13; and

f) the monetary relief represented approximately 43% of the disparity in compensation that was the basis for the allegations in the complaint, and was comparable to, or greater than, monetary awards in similar discrimination suits against financial services firms, ER 117, 333.

4. Whether Judge Henderson abused his discretion by denying the nonparty objectors' motion for extensive, burdensome, time-consuming, and duplicative discovery, when "Objectors ... had meaningful participation in the settlement proceedings, the Court ha[d] sufficient facts before it to intelligently evaluate the settlement, and discovery would [have] cause[d] unnecessary delay." ER 323.

STANDARD OF REVIEW

The "decision to approve or reject a [class] settlement is committed to the sound discretion of the trial judge because he is 'exposed to the litigants and their strategies, positions, and proof.' " *Hanlon v. Chrysler*, 150 F.3d 1011, 1026 (9th Cir. 1998); *Officers for Justice v. Civil Serv. Comm'n* 688 F.2d 615, 625-26 (9th Cir. 1982). This Circuit "review[s] a district court's decision to approve a class action settlement for a clear abuse of discretion." *Molski v. Gleich*, 318 F.3d 937, 953 (9th Cir. 2003). The district court's class certification is reviewed for an abuse of discretion. *Id*. at 946. Likewise, "district courts have wide latitude in ***4** controlling discovery, which [this Court] review[s] for an abuse of discretion." *In re Arizona*, 528 F.3d 652, 655 (9th Cir. 2008).

If a trial court has identified the correct legal rule, it abuses its discretion only if its "application of the correct legal standard was (1) illogical, (2) implausible, or (3) without support in inferences that may be drawn from facts in the record." *United States v. Hinkson*, 585 F.3d 1247, 1262 (9th Cir. 2009) (en banc) (citations omitted). A district court's factual findings are reviewed for clear error and must be accepted if they fall within "any of the permissible choices the court could have made" based on the record. *Id*. at 1261-62.

STATEMENT OF FACTS

The Second Amended Complaint in this action alleges that the policies and practices through which Defendant Morgan Stanley distributed business opportunities, investment accounts, and sales support under its control to its Financial Advisors and Registered Financial Advisor Trainees (collectively "FAs") had the effect of distributing accounts and other business opportunities to white FAs to the disadvantage of African-American and Latino FAs ("minority FAs"). Because FAs were generally paid by commission, those policies and practices substantially reduced the compensation of minority FAs. ER 1182-83.

The settlement in this case reduces the emphasis on historic factors, such as assets under management, in the formula used by Morgan Stanley to distribute the accounts of departing brokers, such that the formula no longer has a disparate impact on minorities. ER 851-52. The settlement also provides substantial additional injunctive relief, including providing assistance to FA Trainees in their efforts to pass the licensing exam, expanding recruitment of minority FA Trainees, studying the reasons why minority FAs leave the company, and monitoring whether managers take steps to improve opportunities for minority FAs. ER 151-67. The settlement provides $16 million in monetary relief; under the proposed settlement, the 422 persons who submitted claims will receive average awards of approximately $33,000.[FN1] The attorneys' fees of $800,000 for work done through entry of the Settlement Agreement were only 5% of the Settlement Fund obtained and were less than the lodestar value of class counsel's work, PSER 170, 222, 248; even with the payment of $150,000 a year to class counsel to monitor Morgan Stanley's compliance, the total attorneys' fees are less than 10% of the Settlement Fund. ER 168-78, 182.

FN1. The average recovery will in fact be greater because of the significant interest that has accrued since

February 2008. *See infra* note 3.

The district court exercised an extraordinary degree of care in determining whether to approve the proposed settlement, twice postponing decisions until the parties had submitted additional evidence. ER 222, 233-34, 345-53. After preliminary approval, more than 31% of the approximately 1,300 class members submitted claims, while only 24 class members opted out and 9 lodged objections. ER 112. The district court subsequently granted final certification to the class and final approval to the class settlement. ER 107-08. Class members who objected to the proposed settlement but did not exercise their right to opt out (hereinafter "Objectors") appeal the district court's certification of the class and its preliminary and final approval of the settlement.

I. The Comprehensive Remedy Afforded by the Settlement Addresses the Allegedly Discriminatory Practices at Morgan Stanley.

The Settlement Agreement negotiated between the parties and approved by the district court provides comprehensive injunctive relief and very substantial monetary relief.

Perhaps most important, the Settlement Agreement requires a comprehensive revision of the "Power Ranking" system used by Morgan Stanley to distribute the accounts of departing FAs. The old system disadvantaged minority FAs by relying largely on historical measures of performance, such as assets under management. Pursuant to the settlement, Morgan Stanley will revise the Power Ranking formula to reduce its reliance on historical factors.[FN2] ER 115, 154. Morgan Stanley will also inform each FA of his or her individual ranking whenever a distribution is made, and permit FAs to review the actual distribution of a departing FA's book. ER 155. The Settlement Agreement requires that Morgan Stanley review the account distribution system annually to evaluate its impact on minority FAs. ER 155-56.

> FN2. The settlement of a gender discrimination action against Morgan Stanley, *Augst-Johnson v. Morgan Stanley*, was granted final approval by the District Court for the District of Columbia on October 26, 2007. ER 938. That settlement created a new Power Ranking formula to distribute the accounts of departing FAs. The new system reduced the use of historical factors in such assignments. Since the use of historical factors in the new formula still had an adverse impact on minorities, however, class counsel in this case successfully negotiated an even further reduction of reliance on historical factors in the Power Ranking formula. ER 115, 851.

The Settlement Agreement also mandates a number of programs for training, re-education, and other developmental programs for minority FAs over its five-year term, including requiring that Morgan Stanley:

(a) maintain a dedicated position whose primary function is the sourcing and recruiting of qualified diverse candidates, and develop sourcing alternatives for qualified minority FAs, ER 152;

(b) develop initiatives to attract and retain minority FAs and to enhance their success, ER 161;

(c) include in Branch Manager compensation a meaningful diversity component designed to measure and reward efforts to diversify representation rates, and require a quarterly self-assessment of such efforts and monitoring of those efforts by an independent diversity monitor, ER 153-54;

(d) post available field sales management positions and their minimum requirements on an Internal Job Bank and provide email notifications to interested FAs, ER 152;

(e) provide diversity training to all management-level field personnel, and incorporate elements of the Implicit

Association Test or a similar tool into the diversity-related training provided to field sales branch management, ER 153;

(f) appoint an independent diversity monitor to evaluate Morgan Stanley's efforts to implement the settlement and appoint two named industrial psychologists to work with Morgan Stanley and class counsel to improve the representation and success rates of minority FAs at Morgan Stanley, ER 162-67;

(g) provide additional assistance to FA Trainees in passing the Series 7 licensing exam, ER 153; and

(h) interview FAs who leave Morgan Stanley and report the results to the industrial psychologists and the diversity monitor, ER 161.

To remedy the past effects of Morgan Stanley's policies and practices, the settlement establishes a Settlement Fund of $16 million plus 5% per annum interest from the date of Preliminary Approval until resolution of all appeals. ER 139-40, 168. In addition, Morgan Stanley will pay its share of payroll taxes and contributions on amounts designated as wages. ER 169. The portion of the Settlement Fund allocated to attorneys' fees of $1,550,000 (which includes $800,000 for time spent preparing the case through final settlement approval and $150,000 per year for five years of monitoring compliance with the terms of the Settlement Agreement) is relatively modest, less than 10% of the Settlement Fund amount. ER 182.

The net Settlement Fund of "well over $14,000,000" will be allocated among the 422 class members who submitted timely and valid claim forms.[FN3] ER 112, 171, 351. Eighty-five percent of the allocation formula is based upon a class member's response to questions in the claim form: Members are awarded 1 point for each week that they worked as an FA during the covered period, up to 50 additional points for extreme emotional distress, and up to 50 additional points for production-related terminations and related claims of constructive discharge. ER 172. The remaining 15% of the formula is allocated on the basis of an Earnings Regression Component, which provides additional funds to those class members whose annual earnings during the covered period fell below an earnings curve set two deviations above the mean earnings curve for white FAs. ER 171.

> FN3. The net Settlement Fund is computed as follows: $16 million, plus interest, less the sum of (1) $1,550,000 in approved attorneys' fees and costs; (2) $25,000 in court-approved service payments; (3) a $125,000 payment to Curtis-Bauer to surrender her non-class claims; and (4) less than $50,000 in costs of notice and claims administration. ER 351. Because the settlement was preliminarily approved nearly two years ago, nearly $1.6 million interest has already accrued. The present net value of the Settlement Fund to be distributed to class members is therefore greater than $15.6 million.

II. The Experienced District Judge Carefully Examined All Aspects of the Proposed Settlement Before Certifying the Settlement Class and Granting Final Settlement Approval.

The original Complaint in this action was filed by Daisy Jaffe, a white woman, in June 2006. ER 1263. That Complaint alleged that Morgan Stanley's account distribution policies and practices discriminated against female FAs on the basis of their gender. *E.g.*, ER 1264. Denise Williams was added as a named plaintiff on October 10, 2006. ER 1243. The Amended Complaint alleged that Williams was discriminated against on the basis of her race. *E.g.*, ER 1252-54.

On November 2, 2006, Williams, with the assistance of class counsel, filed an EEOC charge alleging class-wide discrimination against minority FAs at Morgan Stanley. PSER 797-99, 943. In January 2007, class counsel informed Morgan Stanley that Williams intended to pursue her claims of race discrimination on behalf of a class of minority FAs. ER 848. Williams and Morgan Stanley entered into a tolling and standstill agreement regarding class claims of race discrimination. ER 855-57.

In January 2007, the district court stayed the class gender discrimination claims in this action because of ongoing settlement negotiations in a parallel gender discrimination class action proceeding in the United States District Court for the District of Columbia, *Augst-Johnson v. Morgan Stanley*. ER 1212. On April 24, 2007, the parties to *Augst-Johnson* moved for preliminary approval of a gender discrimination class settlement. PSER 804. The district court in the *Augst-Johnson* case granted final approval to that settlement on October 26, 2007. ER 938.

From February 2007 through July 2007, the parties to this action engaged in arms' length settlement negotiations, with the assistance of an experienced neutral mediator, regarding class claims of race discrimination. ER 332. Plaintiffs' counsel "discussed settlement terms with Ms. Williams before even entering into settlement discussions" and, throughout the settlement negotiations, "Ms. Williams was kept informed of and consulted about the settlement process...." ER 109; *see also* ER 1374, 1377, 1380-81, 1383-87; PSER 854-56, 944-46, 951-52, 954, 957-61, 965, 968, 972.[FN4] The mediation was "difficult and time consuming." PSER 468. Plaintiffs' counsel received a substantial number of documents from Morgan Stanley, including a vast amount of data, and hired experts to conduct numerous analyses of that data. PSER 468; PSER 537-40. The mediator reported, and the district court found, that the parties "advocated their clients' positions vigorously and at arms' length." PSER 469; ER 332. "[N]egotiations almost reached impasse on more than one occasion when one side or the other chose not to negotiate off. . . principled positions." PSER 468.

> FN4. To avoid burdening this Court with two briefs, Plaintiffs - Appellees will not, unless this Court so requests, specifically discuss the contents of the material filed under seal in the district court and in this Court, but will simply cite those portions of the sealed material that support the district court's factual conclusions.

In July 2007, class counsel became concerned about Williams' ability to represent the class adequately. *See* ER 1362, 1370, 1375-76; PSER 961-62. Margaret Benay Curtis-Bauer, who had contacted class counsel in May 2007, expressed interest in becoming a named plaintiff representing the class of minority FAs. ER 327; PSER 978-79. Curtis-Bauer, an African-American female, was an FA at Morgan Stanley for 13 years, from 1989 until 2002. ER 1185, 1193. As a class representative, Curtis-Bauer understood her duties to the class, evaluated the proposed settlement reached by the parties, and suggested particular provisions for inclusion in the settlement agreement. ER 327; PSER 978-79, 992-94. Specifically, Curtis-Bauer "suggested that Branch Manager compensation should be affected to ensure compliance with the terms of the settlement because money is what motivates Branch Managers" and opined that, "for accounts where the company does not follow the power ranking system due to an 'exception,' ... 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." ER 774. Curtis-Bauer later "confirmed that these suggestions were included in the final settlement agreement." *Id.*[FN5]

> FN5. Objectors' false assertion that Curtis-Bauer was uninformed and unengaged is based upon declarations involving multiple levels of hearsay that the district court did not permit them to file and that are therefore not properly before this Court. *See* Plaintiffs - Appellees' Motion To Strike Certain Portions of Objectors - Appellants' Excerpts Of Record (hereinafter "Motion To Strike"). Objectors' misrepresentations are directly contradicted by declarations from Curtis-Bauer, her former husband, and class counsel, PSER 422, 424, 978-79, 992-94, and are contrary to the district court's findings regarding Curtis-Bauer's participation, ER 327. This Court must accept the district court's factual findings absent clear error. *Hinkson*, 585 F.3d at 1260. Because Objectors have not argued that the district court's factual findings were clearly erroneous, that argument is waived. *Dream Games of Arizona, Inc. v. PC Onsite*, 561 F.3d 983, 994 (9th Cir. 2009). In any event, given the extensive evidentiary support for those findings, Objectors cannot demonstrate that they fell outside "any of the permissible choices the court could have made." *Hinkson*, 585 F.3d at 1261.

On August 2, 2007, Morgan Stanley and plaintiffs Williams and Curtis-Bauer announced a settlement in principle of the class-wide race and/or color discrimination claims, ER 1213, and stipulated to the filing of the Second Amended Complaint, ER 1207. The Complaint included class-wide claims of race and/or color discrimination, added Curtis-Bauer as a named plaintiff and representative of the class of minority FAs, and named Williams as representative of a class of African-American FAs. ER 1181-1206.

On October 22, 2007, Morgan Stanley and Plaintiffs sought preliminary approval of the proposed settlement and provisional certification of the class. PSER 657. Because Williams had chosen to opt out of the proposed settlement,

PSER 658 n.2, 961-62; ER 105, 109, 1362, 1375-76, Curtis-Bauer, rather than Williams, moved for settlement, class certification, and preliminary settlement approval.

On December 3, 2007, the district court held a several-hour long hearing on Curtis-Bauer's motion for certification of a settlement class and preliminary settlement approval. The district court heard extensive argument from counsel for 18 class members and two non-class members who objected to preliminary settlement approval.

On December 12, 2007, the district court issued an order rejecting many of Objectors' arguments. ER 347-49, 351. The court found that the settlement negotiations in this action were non-collusive and at arms' length: "[T]he Court finds no collusion.... [M]ediator Hunter Hughes submitted a detailed statement confirming that the negotiation of this settlement was at arm's length." ER 350 n.2. The court also found that "[t]here has been no showing that Curtis-Bauer is an unsuitable class representative for Latinos," concluding that an African American can represent a class of Latinos and African Americans where, as here, the challenged policies and practices affected both groups in the same manner. ER 347-48. As to the proposed injunctive relief, the court "[was] satisfied that the injunctive relief package is not simply a 'carbon copy' of the relief Morgan-Stanley has already agreed to in the *Augst-Johnson* settlement. The programmatic relief set out in sections VII.B., VII.C, VII.D.2.d, VII.E and VII.G appears to represent a genuine expansion rather than a dilution of relief already ordered in *Augst-Johnson."* ER 350. As to monetary relief, the court rejected Objectors' arguments based on inapposite settlements involving arbitration proceedings, ER 351 n.4, and found that the $16 million provided in the proposed settlement was, according to statements of counsel, "a healthy 43% of the possible recovery." ER 352. Instead of relying on statements of counsel, however, the court "invite[d] the Plaintiffs to submit some evidence in support of this statement, whether by declaration of counsel, a retained expert, or some other means, which will help the Court review the fairness of the monetary award." ER 352. The court also requested supplemental submissions regarding "Ms. Curtis-Bauer's involvement in the litigation and review of the settlement, or any other evidence that can show her adequacy as a representative...." ER 347. The parties thereafter submitted additional briefs and declarations regarding Curtis-Bauer's involvement in the litigation, her review of the settlement, the settlement of her non-class claims, the value of the injunctive relief, and the potential value of the class claims were Plaintiffs to prevail at trial. *See* PSER 300-419, 984-1000.

The additional evidence, together with the parties' original submissions, gave the district court a firm evidentiary basis for the findings in its February 7, 2008 order certifying a settlement class and giving preliminary settlement approval. The district court found that the supplemental submissions "assuaged its concerns about both the adequacy of representation and the fairness of the settlement." ER 322. The district court determined that it had "sufficient facts before it to evaluate the settlement.... which appears at this stage to be fundamentally fair, adequate and reasonable when viewed as a whole." ER 322.

The district court then addressed, and made express and detailed findings about, each of the elements of Rules 23(a) and 23(b)(2). The court re-affirmed its finding that Curtis-Bauer's claims are typical of both African Americans and Latinos "because she was allegedly injured by the same discriminatory nationwide policies and practices with respect to account distribution ...." ER 325.

The court also re-affirmed its finding that Curtis-Bauer "could adequately represent Latino FAs and FA Trainees and Morgan Stanley employees with other levels of production or tenure." *Id*.

The district court also explicitly found that Curtis-Bauer could vigorously represent the class despite her late involvement:

Her declaration explains that she is serving as a class representative primarily because she wants to effect systemic change at Morgan Stanley. Her first discussion with Plaintiffs' counsel about the case was in May 2007. She was not

presented with the settlement as a *fait accompli* before joining the suit; instead, she expressed interest in becoming a plaintiff, became a plaintiff, and then evaluated the proposed settlement. Her declaration shows that she was aware of her fiduciary duties to the class, felt capable of assessing the settlement and the approach of counsel, and found that approach appropriate to meeting the goals of the suit. She suggested substantive changes which were ultimately incorporated into the settlement agreement.

ER 327 (citations omitted).

Regarding the payment to Curtis-Bauer of $125,000 for releasing her nonclass claims, including potentially explosive claims for race harassment, the court noted that class counsel argued that Curtis-Bauer's non-class claims for race harassment were not time-barred, and recognized that, even if Morgan Stanley might ultimately prevail on a statute of limitations defense, it could reasonably choose to settle those claims to avoid the cost and adverse publicity of such litigation. ER 327-28. Most important, the court found that "there is no evidence that Ms. Curtis-Bauer did, in fact, fail to evaluate the settlement, sacrifice the interests of absent class members to her own, or accept an unfair settlement.... While Ms. Curtis-Bauer may or may not have been able to settle her non-class claims without the class action, there is no evidence that she has benefited *at the expense of the class.*" ER 328-29. The court concluded that "Ms. Curtis-Bauer's supplemental declaration provides this Court with sufficient facts to determine that she is an engaged representative, that she has taken her duties as a class representative seriously, that she has released distinct non-class claims, and that her interests are aligned with those of the class." *Id*.

Pursuant to the order granting preliminary settlement approval, notice was mailed. The reaction of the class supported approval: 422 of the approximately 1,300 class members, over 31% of the class, submitted claims forms -- evidencing a desire to participate in the monetary recovery provided by the settlement. ER 112. Twenty-four class members opted out of the settlement; nine chose to remain in the class while lodging objections with the court. *Id*.

The parties jointly moved for final approval of the settlement and certification of the settlement class on May 12, 2008. PSER 296. The district court conducted a lengthy hearing on June 16, 2008, which included extensive presentations from counsel for the parties and Objectors. The court also invited Objectors to speak. On July 7, 2008, the district court referred the matter to a magistrate judge for an evidentiary hearing regarding issues raised by a declaration of Denise Williams submitted by Objectors. ER 233.

Plaintiffs sought leave to move for reconsideration of the court's order, and submitted with that motion extensive evidence fully addressing the court's concerns. ER 1372-89; PSER 15-50, 841-983. Plaintiffs filed under seal a number of documents involving "communications between former plaintiff Denise Williams and Class Counsel which [were] material to the representation and due process issues before th[e] [c]ourt." PSER 1; *see* ER 1372-89; PSER 841-983. Because the documents "reveal[ed] both the strategies and mental impressions of Class Counsel and statements by Ms. Williams that could affect her ongoing individual litigation with Morgan Stanley," the court found good cause for the documents to be sealed. PSER 2. The court noted that Plaintiffs' counsel had good cause to refrain from filing the materials earlier in the litigation. *Id*. n. 1. The court permitted Plaintiffs to file their motion for reconsideration and invited Objectors and Williams to respond. *Id*.

On October 22, 2008, the court withdrew its July 7, 2008 order, explaining that the order had been "ill-advised." The additional material submitted by Plaintiffs for *in camera* review "assure[d] the Court that Ms. Williams was involved [in the] litigation and settlement process. Counsel spent many hours communicating with her. Her involvement, and that of Ms. Curtis-Bauer, were adequate by any standard to satisfy representation and due process requirements." ER 107-08.

In determining whether final certification of the class was appropriate, the court reiterated its prior holding that Curtis-Bauer was an adequate representative, ER 109 (citing ER 325-29), and found that Plaintiffs had "presented

abundant evidence for *in camera* review to refute Ms. Williams' allegation that she was not involved in the litigation or settlement":

Plaintiffs' counsel interviewed Ms. Williams thoroughly about her experiences at Morgan Stanley, gaining knowledge that informed their ability to craft an appropriate settlement. The Court is also convinced that counsel discussed settlement terms with Ms. Williams before even entering into settlement discussions. Ms. Williams was kept informed of and consulted about the settlement process.... Even though Ms. Williams ultimately rejected the settlement and her relationship with class counsel broke down, the extent of her involvement was sufficient, particularly given the subsequent review and approval of the settlement by Ms. Curtis-Bauer.

Id.

In its October 22, 2008 order, the district court granted final settlement approval, finding that the proposed settlement was fundamentally fair, adequate, and reasonable. The court explained that "[t]he plaintiffs would face considerable risks were they to proceed to trial" and that both the "thoughtful assessment of the terms of the settlement" by class counsel and the positive response of class members to the proposed settlement "weigh[ed] in favor of approval." ER 111-12. The "most important" factor for the court was "the strength of the injunctive and monetary relief the Settlement provides." ER 112. The court found that "the Settlement Agreement provides substantial injunctive relief that "represents an expansion of the relief provided in the settlement of a parallel gender discrimination case against Morgan Stanley, *Augst-Johnson*, [] and is substantive, meaningful and valuable to the class." ER 112-13. Likewise, the court determined that the monetary relief was substantial; it "represent[ed] over 40% of the predicted disparity in compensation which Plaintiffs sought as damages," and was "comparable to that approved by the District Court for the District of Columbia in settlement of the parallel *Augst-Johnson* case," as well as to the settlement in another parallel gender discrimination case against Smith Barney. ER 117. Accordingly, the court granted final certification to the class and final approval to the settlement, issued the Settlement Agreement as an order of the court, and entered final judgment. ER 123-28.

SUMMARY OF ARGUMENT

"[V]oluntary conciliation and settlement are the preferred means of dispute resolution. This is especially true in complex class action litigation, and even more so where the subject matter is employment discrimination." *Officers for Justice*, 688 F.2d at 625. Here, the district court, applying the proper legal standards and demonstrating an extraordinary degree of attention to the concerns raised by the unique and unlikely to recur procedural context of this case, determined that the class met the requirements for certification under Rule 23 and that the settlement was fundamentally fair, reasonable, and adequate. Objectors' challenges to the court's factual and legal conclusions come nowhere near establishing the abuse of discretion required for reversal.

The district court properly granted preliminary approval to the settlement after finding that there was no evidence of collusion and that the settlement followed extensive, arms' length negotiations between the parties. ER 332. Plaintiffs filed a class charge of race discrimination eight months before announcing the settlement and filing the Second Amended Complaint. The parties then engaged in extensive informal discovery, and Plaintiffs had access to extensive data from Morgan Stanley and expert analyses of that data, as well as a great deal of knowledge acquired through months of involvement in the case. ER 332; PSER 468, 537-40.

Likewise, the district court did not abuse its discretion in certifying the putative class of minority FAs. As the district court found, the involvement of Williams and Curtis-Bauer was adequate by any standard to satisfy Rule 23(a)(4) and due process. ER 108. The court's determination was based on its finding that class counsel consulted with Williams throughout the settlement negotiations, ER 109; that Curtis-Bauer was aware of her fiduciary duties to the class and evaluated the proposed settlement accordingly, ER 327; that Curtis-Bauer did not benefit at the expense of the class, ER

329; and that there were no discernable conflicts between African-American and Latino class members, ER 349. Curtis-Bauer also satisfied the typicality requirements of Rule 23(a)(3) because her claims were reasonably co-extensive with those of the absent African-American and Latino class members. As the district court found, all class members, be they African-American or Latino, experienced the same course of conduct and suffered similar injuries, and any disparities in compensation were not so great that it was unfair to treat African Americans and Latinos similarly. ER 333.

Final approval was also appropriate. The settlement was reached after arms' length negotiations; Plaintiffs faced considerable risks at trial; the settlement was endorsed by experienced class counsel; and the reaction of class members was overwhelmingly positive. The settlement provides injunctive relief that is valuable to the class and that expands upon the relief provided in the settlement of a parallel gender discrimination case against Morgan Stanley. ER 112-13. Likewise, the monetary relief amounts to over 40% of the compensation shortfall that Plaintiffs sought as damages, and is similar to, or higher than, monetary relief in settlements approved in comparable cases. ER 116-17.

The district court also did not err in denying Objectors' request for discovery or vacating its order mandating an evidentiary hearing. Objectors do not have an absolute right to discovery; a court may, in its discretion, limit objector discovery to that which will assist the court in evaluating the settlement. *See, e.g., Scardelletti v. Debarr*, 265 F.3d 195, 204 (4th Cir. 2001), *rev'd on other grounds sub nom., Devlin v. Scardelletti*, 536 U.S. 1 (2002). The district court here had before it a more than sufficient record, including a number of submissions specifically requested by the court, and Objectors have demonstrated no holes in the record requiring additional discovery or an evidentiary hearing.

ARGUMENT

I. The District Court Did Not Abuse its Discretion by Provisionally Approving a Settlement that Easily Fell Within the Range of Possible Settlement Approval.

Objectors contend that the settlement did not meet the standard for preliminary approval because it was not the result of an arms' length negotiation and because the evidentiary record was insufficient. Both contentions are contrary ***23** to the record and to the district court's explicit findings. Because the settlement here was non-collusive and easily fell within the "range of possible approval," *Boyd v. Bechtel Corp.*, 485 F. Supp. 610, 615 (N.D. Cal. 1979), the district court acted well within its discretion in granting preliminary approval to the settlement.

A. The Settlement Was the Result of Arms' Length Negotiations.

In granting preliminary approval, the district court found that "there was no evidence of collusion between the Parties during the settlement process," and that "[t]he settlement and Settlement Agreement are the result of extensive, arms' length negotiations between the Parties" that included "the involvement of an experienced mediator...." ER 332. Its conclusion undoubtedly fell within "any of the permissible choices the court could have made" on the basis of the record before it. *Hinkson*, 585 F.3d at 1261. The record established that Williams, represented by class counsel, filed an EEOC charge including class-wide race discrimination claims in November 2006, notified Morgan Stanley of her intention to pursue class relief in January 2007, and shortly thereafter entered into a tolling agreement regarding class race discrimination claims. ER 350 n.2, 848-49, 855-57; PSER 797-99, 924-25. The parties thereafter engaged in extensive negotiations with the help of an experienced neutral mediator. The mediator reported that the mediation was "difficult and time-consuming," involved in-person sessions in three different cities, as well as scores of telephonic conferences and the exchange of numerous proposals, and nearly reached impasse on multiple occasions. PSER ***24** 468-69. "Throughout the process, counsel for the parties advocated their clients' positions vigorously and at arms' length." PSER 469.

Objectors contend that the simultaneous filing of the Second Amended Complaint and announcement of the settlement in principle demonstrates that the negotiations were not conducted at arms' length. By pursuing settlement negotiations

before filing the Amended Complaint, however, the parties simply heeded Title VII's "preference for voluntary settlement[] of disputes through the conciliation process." *Gulf Oil Co. v. Bernard*, 452 U.S. 89, 101 n.14 (2001). "[T]he central theme of Title VII is 'private settlement' as an effective end to employment discrimination," *Culpepper v. Reynolds Metals Co*., 421 F.2d 888, 891 (5th Cir. 1970), and the very purpose of its requirement that aggrieved parties file a charge with the EEOC before bringing suit is to promote voluntary settlement in lieu of litigation. *See Alexander v. Gardner-Denver Co*., 415 U.S. 36, 44 (1974). Objectors' contention that the parties erred by pursuing pre-filing settlement negotiations is contrary to Title VII's "clearly defined policy of deferring action in federal court until a charge has been filed with the agency and an opportunity afforded ... to attempt private settlement." *Macklin v. Spector Freight Systems, Inc.*, 478 F.2d 979, 986 (D.C. Cir. 1973).

In accordance with the policies underlying Title VII, the parties here entered into a tolling agreement and pursued settlement negotiations before filing the Second Amended Complaint, thereby conserving resources while maintaining their ***25** respective positions. *Compare In re General Motors Corp. Pick-Up Truck Fuel Tank Products Liability Litigation*, 55 F.3d 768, 790 (3d Cir. 1995). The procedure also saved Morgan Stanley adverse publicity about a pending race-discrimination class action. The parties' actions were entirely reasonable and in no way demonstrate that the subsequent six months of negotiations, which nearly reached impasse several times, were collusive or non-adversarial. *Cf. S.E.C. v. Randolph*, 736 F.2d 525, 527-28 (9th Cir. 1984).[FN6]

> FN6. Objectors contend that an email sent by Morgan Stanley to its class member employees regarding the proposed settlement demonstrates that class counsel were "reifying] on Morgan Stanley to garner support for the settlement." Objectors - Appellants' Opening Brief at 42. Morgan Stanley's email, however, simply directed employees to the appropriate source for information regarding the settlement. PSER 432-33.

Objectors' argument that the settlement was reached without sufficient discovery ignores the evidentiary record, which establishes that there was extensive informal discovery and exchange of information. Formal discovery is not required "where the parties have sufficient information to make an informed decision about settlement." *In re Mego Fin. Corp. Sec. Litig.*, 213 F.3d 454, 459 (9th Cir. 2000) (citations omitted); *cf. United States v. Oregon*, 913 F.2d 576, 582 (9th Cir. 1990). As the district court found, the settlement was reached only after extensive investigation and analysis. ER 111. Numerous declarations established that Morgan Stanley produced extensive documents and statistical data requested by class counsel, ER 849; PSER 466, 468 -- informal discovery that was ***26** coextensive with the formal discovery class counsel would have obtained in contested litigation. Class counsel then retained an expert to analyze the data. PSER 466. Since class counsel were fully informed of the strengths and weaknesses of their case, they were in a position to represent the interests of the class effectively. Requiring parties to conduct formal discovery, instead of informal investigation, would not only put form over substance and be contrary to existing precedent, but would also waste time and resources better spent on resolving the problem.

Finally, Objectors' contentions regarding the non-participation of certain class members during the settlement negotiations are irrelevant to determining whether the negotiations were conducted at arms' length. As the district court recognized, "[t]here is no requirement that the class representative, rather than class counsel, negotiate the terms of a settlement." ER 347; *see Staton v. Boeing Co*., 327 F.3d 938, 959 (9th Cir. 2003) ("The class members are not at the table; class counsel and counsel for the defendants are."). Furthermore, Objectors' contentions are contrary to the record and to the district court's findings. Class counsel did not negotiate the settlement and then seek a class representative for purposes of ratification but, instead, added an additional class representative to ensure that the class would be adequately represented throughout the settlement proceedings. ER 1362, 1370, 1375-1377; PSER 961-62.

***27** *B. Informal Discovery, Data Collection, Expert Analyses, and Class Member Interviews Established an Extensive Evidentiary Record in Support of the Settlement.*

The district court exercised unusual diligence in ensuring that the record was adequate to permit informed evaluation of the proposed settlement. The court not only held an extensive hearing on preliminary settlement approval, but also requested supplemental briefs and evidence. At the time of preliminary approval, the record before the court included

the Settlement Agreement; Morgan Stanley's Power Ranking formula; and expert analyses; as well as declarations from Curtis-Bauer; from three of Plaintiffs' attorneys, one of whom described in detail the estimated monetary value of the class claims; from two of Morgan Stanley's attorneys; and from two industrial psychologists. ER 331. This evidence provided the court with a comprehensive picture of Morgan Stanley's employment practices, the value of the settlement to the class, and the settlement negotiation process. The Court also considered the arguments and supporting evidence in Objectors' properly filed briefs, ER 948-1180, and the arguments at the preliminary hearing, including in-person statements from certain objectors. ER 38-54, 331-32.

Objectors nonetheless contend that the discovery in this case "failed to provide sufficient basis for an appropriate settlement." Objectors - Appellants' Opening Brief ("AOB") at 43. However, the material before the court did not need to be produced pursuant to formal discovery or made available to Objectors to permit intelligent evaluation of the settlement *by the court*. Objectors' assertion ***28** that Morgan Stanley failed to inform class counsel of its negotiations with another group of minority FAs does not call the sufficiency of the record into question. Objectors point to no specific inadequacies in the record that rendered the court's decision uninformed or unintelligent. Their generalized assertions regarding the record's insufficiency do not establish that the court abused its discretion in granting preliminary approval on the basis of the extensive record compiled by the parties.

II. The District Court Did Not Abuse its Discretion in Certifying the Class.

A settlement class must comply with the requirements for class certification established by Rules 23(a) and (b). *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 621 (1997). The district court applied the proper legal standard established by *Staton*, 327 F.3d 938, which requires that courts "pay undiluted, even heightened, attention to class certification requirements" when a settlement is reached before class certification. *Id*. at 952 (citations omitted); ER 323 (citing *Staton)*. Because the court applied the proper standard, this Court's review is limited to whether the district court made a "clear error of judgment" in finding that the class was adequately represented under Rule 23(a)(4), and that Curtis-Bauer's claims were "typical" under Rule 23(a)(3). *Parra v. Bashas', Inc.*, 536 F.3d 975, 978 (9th Cir. 2008).[FN7]

FN7. Objectors do not challenge the court's conclusions as to the other provisions of Rules 23(a) and (b).

***29** *A. The Class Representatives Adequately Represented the Interests of Absent Class Members.*

Rule 23(a)(4) requires that the representative parties "fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). Here, the district court found that the involvement of Williams and Curtis-Bauer was "adequate by any standard to satisfy representation and due process requirements." ER 108. That determination was based on the court's factual findings that class counsel interviewed Williams thoroughly, discussed settlement terms with Williams before entering into settlement discussions, and consulted with Williams throughout the settlement negotiations, ER 109; that Curtis-Bauer served as a class representative to effect systemic change at Morgan Stanley, was aware of her fiduciary duties, evaluated the proposed settlement, and suggested substantive provisions for inclusion in the settlement, ER 327; that, in receiving additional compensation for her non-class claims, Curtis-Bauer did not benefit at the expense of the class, ER 329; and that there were no conflicts between African-American and Latino FAs that would prevent Curtis-Bauer from adequately protecting the interests of African-American and Latino class members, ER 349. Those findings were supported by the record, and the conclusions based thereon were entirely within the court's discretion.

***30** *1. Ms. Curtis-Bauer's Interests Are Consistent with Those of the Class*.

Objectors are incorrect that the payment received by Curtis-Bauer for settlement of her non-class claims of racial harassment rendered her an inadequate representative. The district court found that Curtis-Bauer "did not bargain away absent class members' claims in exchange for settlement of her non-class claims" and found "no evidence that she has benefited *at the expense of the class*." ER 329.[FN8]

FN8. Objectors do not object to the $25,000 service payment to Curtis-Bauer. The district court's approval of that service payment was well within its discretion, *see, e.g., In re Mego Fin. Corp. Sec. Litig.*, 213 F.3d at 463, and is not challenged.

The district court was correct. Curtis-Bauer received the additional payment for the settlement of individual racial harassment, wrongful termination, and business interference claims. *See* PSER 997-98. Such a settlement of non-class claims by a class representative does not render a class representative atypical or inadequate. *See Satchell v. FedEx Exp.*, No. C 03-2659 SI, 2006 WL 3507913, at *1 (N.D. Cal. Dec. 5, 2006) (plaintiff with non-class claims is not "non-typical"); 8 *Newberg on Class Actions* § 24.129, at 504-05 (4th ed. 2002); *cf. Ingrahm v. Coca-Cola Co.*, 200 F.R.D. 685, 688, 694, 699 (N.D. Ga. 2001) (finding representation adequate where class representatives received $300,000 incentive awards in lieu of awards pursuant to the settlement's monetary relief provisions, which averaged $38,000). Although Objectors assert that Curtis-Bauer's non-class claims were ***31** time-barred, Curtis-Bauer had grounds for arguing that they were timely when settled, based upon a broad tolling agreement covering the race discrimination claims of Morgan Stanley's African-American FAs. *See* ER 1163. Furthermore, as the court found, Morgan Stanley had a strong incentive to avoid the adverse publicity arising from litigation of Curtis-Bauer's racial harassment claims. ER 328.

Unlike in *Staton*, the Settlement Agreement here is favorable to all class members, and the settlement of Curtis-Bauer's non-class claims does not affect the injunctive relief or significantly diminish the amount of monetary relief available to the remainder of the class, since it is a relatively small sum (less than 1% of the monetary relief to the class) that can be paid from interest earned on the Settlement Fund. In *Staton*, by contrast, the settlement provided that more than half of a $7.3 million settlement would be awarded at class counsel's discretion to 237 "individually identified recipients" who received average awards of $16,500, while the remainder would be distributed to 3,400 other class members, with individual awards averaging $1,000. *See Staton*, 327 F.3d at 948. The Court found "no sufficient justification in the record for this differential in the amount of damage awards and the process for awarding them," *id*. at 975, and suggested "that class counsel were simply rewarding ... those class members who had promised to contribute toward their costs during the pendency of the suit," *id*. at 976. Here, the justification for the additional payment to Curtis-Bauer is readily apparent: She ***32** released claims that were not released by other members of the class. There is no basis for reversing the court's finding that the payment to Ms. Curtis-Bauer created no conflict with the class. *See, e.g., Lurns v. Russell Corp.*, 604 F. Supp. 1335, 1336 (M.D. Ala. 1984) ("Difference in treatment may be proper as long as it is based on legitimate considerations.").[FN9]

FN9. In addition to lacking merit, Objectors' argument is misplaced. Notwithstanding the apparent self-dealing in *Staton*, the *Staton* court found adequate representation under Rule 23(a)(4), explaining that any preference in the settlement agreement for the named plaintiffs or for a particular subset of the class "is better dealt with as part of the substantive review of the settlement" rather than as a matter of adequate representation. *Staton*, 327 F.3d at 958.

Objectors' "appearance of conflict" argument is similarly meritless. As the district court recognized, "there is no evidence and only Objectors' speculation that any improprieties have taken place." ER 329. The cases cited by Objectors do not suggest that mere speculation by an objector regarding a named plaintiff's motives renders that plaintiff inadequate. Instead, all involved arrangements that inherently created a potential for conflict, such as a fee sharing agreement between class counsel and the class representative's husband. *Swift v. First USA Bank*, No. 98 C 8238, 1999 WL 1212561 (N. D. Ill. Dec. 15, 1999). The present case involves no such inherent conflict.

2. Ms. Curtis-Bauer Adequately Represented Both African-American and Latino Class Members.

The district court, after reviewing the relevant workforce data, found that, because there was no discernable conflict

between African-American and Latino class members, class representation was adequate notwithstanding the absence of a Latino class representative.[FN10]

FN10. Several Latinos submitted letters in support of the settlement. PSER 448, 450, 452, 454, 458, 462.

***33** Its decision was correct. African Americans and Latinos were similarly situated with regards to the harm caused by Morgan Stanley's practices and the relief provided in the settlement agreement. African-American and Latino FAs at Morgan Stanley were compensated less than white FAs, PSER 466, based in large part on Morgan Stanley's system of account distribution, which was weighted heavily toward historical factors such as assets under management and past production. Under the settlement, Morgan Stanley will de-emphasize those historical factors, allowing African-American and Latino FAs who may not have benefited under the prior compensation scheme to compete more favorably going forward. ER 154. Likewise, African Americans and Latinos are similarly situated in that both groups are hired into FA positions at lower rates than expected. PSER 466. The settlement requires Morgan Stanley to take specific steps to increase the representation of qualified African Americans and Latinos in FA positions. ER 151-52, 162-67. Finally, African Americans and Latinos are similarly situated with respect to turnover, in that both groups have substantially higher rates of turnover than whites. PSER 466. The proposed Settlement Agreement contains provisions designed to increase retention and decrease the turnover rates of minority FAs, ER 152-54, 162-67, thereby benefiting both African-American and Latino class members.

Unlike in *Amchem; Payne v. Travenol Labs, Inc*., 673 F.2d 798 (5th Cir. 1982); or *Bartlelson v. Dean Witter & Co*., 86 F.R.D. 657 (E.D. Pa. 1980), the class ***34** members here do not have antagonistic or distinct interests requiring separate representation. Because there was no conflict between African-American and Latino class members and the groups were similarly situated with respect to both the harm of Morgan Stanley's discriminatory practices and the benefits of the proposed settlement, Curtis-Bauer was an adequate representative for both groups.[FN11]

FN11. Courts have repeatedly found in similar circumstances that a member of one minority group may adequately represent members of other minority groups who suffered similar discrimination. *See, e.g., Gaines v. Boston Herald Inc*., 998 F. Supp. 91, 112-16 (D. Mass. 1998); *Jones v. Milwaukee County*, 68 F.R.D. 638, 640-41 (E.D. Wis. 1975); *Leonard v. Southtec, LLC*, No. 3:04-0072, 2005 WL 2177013, at *10-*11 (M.D. Tenn. Sept. 8, 2005); *N.O.W. v. Bank of California*, No. C-72-441 RFP, 1972 WL 246, at *4 (N.D. Cal. 1972); *Tennie v. City of N.Y. Dep't. of Social Servs*., No. 83 Civ. 0884 (MEL), 1987 WL 6156, at *3 (S.D.N.Y. 1987); 8 *Newberg on Class Actions* § 24.54 ("[C]lasses have been certified in which African-Americans have represented Mexican-Americans, Chicanos, those with Spanish surnames, Native Americans, and Asians."). The factual material cited by Objectors in support of their argument that Ms. Curtis-Bauer could not represent Latinos does not establish that the experiences of Latino class members were so "unique" as to preclude their representation by Ms. Curtis-Bauer. The cited declaration, which in any event is not properly before this Court, *see* Motion to Strike, recounts the experience of a single African-American FA in South Florida and is relevant, if at all, only to evaluating the fairness of the settlement to African Americans. The district court acted well within its discretion in crediting Plaintiffs' objective evidence regarding the impact of Morgan Stanley's policies on Latino and African-American FAs.

3. Ms. Curtis-Bauer Is an Engaged and Informed Class Representative.

Finally, Objectors attack Curtis-Bauer's knowledge of, and engagement with, the proceedings in this case. These unjustified attacks on Curtis-Bauer are ***35** based on material not properly before this Court and are contrary to the district court's specific factual findings.

The district court found that Curtis-Bauer is "an adequate, engaged representative who can vigorously represent the

interests of the class....” ER 326. The court found that she served as a class representative to effect systemic change at Morgan Stanley; that she first discussed the case with class counsel in May 2007, months before the settlement in principle was reached; that she evaluated the proposed settlement with an understanding of her fiduciary duties to the class after becoming a class representative; that she felt capable of assessing the settlement and the approach of counsel and found that approach appropriate; and, finally, that she suggested substantive provisions for inclusion in the settlement agreement. ER 327. This was more than sufficient to satisfy Rule 23(a)(4), which requires only that a class representative “understand[] [her] duties and [be] currently willing and able to perform them.” *Local Joint Executive Bd. of Culinary/Bartender Trust Fund v. Las Vegas Sands, Inc*., 244 F.3d 1152, 1162 (9th Cir. 2001); *see also New Directions Treatment Services v. City of Reading*, 490 F.3d 293, 313 (3d Cir. 2007) (“A class representative need only possess a minimal degree of knowledge ....”).

Objectors' contrary arguments depend almost exclusively on declarations that are not properly before this Court, *see* Motion To Strike, and that do not establish any clear error in the district court's factual findings. The excluded declarations recount alleged conversations between Curtis-Bauer and other FAs, ***36** but are contradicted by the declarations of Curtis-Bauer, her ex-husband, and class counsel. PSER 422, 424, 978-79, 992-94. The district court acted well within its discretion in crediting that testimony rather than the double and triple hearsay offered by Objectors.

Objectors' attack on Curtis-Bauer's knowledge of Morgan Stanley is also meritless. Curtis-Bauer was an FA at Morgan Stanley for thirteen years. Although she worked at Morgan Stanley during a relatively small portion of the period covered by the settlement agreement, many policies and practices at issue in this case existed from the beginning of her employment with Morgan Stanley. ER 1193-95. Although Rule 23(a)(4) does not require that a class representative possess any detailed knowledge of the case, *see Las Vegas Sands*, 244 F.3d at 1162, Curtis-Bauer's thirteen years of experience provided her with extensive knowledge that she used to assist class counsel in selecting appropriate relief.[FN12]

> FN12. Curtis-Bauer's knowledge of Morgan Stanley's practices far exceeded the standards applied in the cases relied upon by Objectors. *See*, e.g., *Wofford v. Safeway Stores, Inc*., 78 F.R.D. 460, 487 (N.D. Cal. 1978) (requiring only “some minimal level of interest in the action, familiarity with the practices challenged, and ability to assist in decisionmaking as to the conduct of the litigation”); *Krim v. pcOrder.com, Inc.*, 210 F.R.D. 581, 587 (W.D. Tex. 2002) (requiring only that representatives “know more than ‘they were involved in a bad business deal.’ ”) (citation omitted).

Objectors also challenge Curtis-Bauer's knowledge by arguing that her suggestions regarding the settlement agreement were of little value. In doing so, Objectors underestimate the value of the settlement's mandatory nature. Even if, ***37** as Objectors contend, “Morgan Stanley has included diversity-related performance measures in branch manager compensation since well before the filing of this lawsuit,” AOB 33, the settlement agreement ensures that the component will be “meaningful,” and makes that component mandatory and subject to monitoring by the diversity monitor, senior management, and class counsel for a specific term. ER 153-54.

Finally, class counsel's experience must also be considered in evaluating the adequacy of representation. *See General Tel. Co. of Southwest v. Falcon*, 457 U.S. 147, 157 n.13 (1982) (noting that the adequacy-of-representation requirement is concerned with “the competency of class counsel and conflicts of interest”). Class counsel here had extensive experience with class action discrimination cases and cases against defendants in the financial service industry, ER 111; PSER 542-609, 615-17, 626-55 -- experience more than sufficient to ensure that the class would receive adequate representation notwithstanding any alleged deficiencies of the named plaintiffs.[FN13]

> FN13. Objectors reliance on *Cavanaugh's* statement that “the inquiry is not into the adequacy or fitness of counsel but into the adequacy of plaintiff,” 306 F.3d 726, 733 (9th Cir. 2002), is misplaced. *Cavanaugh* involved the selection of a lead plaintiff from among various class members competing for that position, as required by the Private Securities Litigation Reform Act, 15 U.S.C. § 78u-4(a)(3), rather than the evaluation

of adequate representation under Rule 23(a)(4). *Cavanaugh* has no bearing whatsoever on the issue before this Court.

***38** *4. The Combined Participation of Ms. Williams and Ms. Curtis-Bauer Was More Than Sufficient To Satisfy Rule 23(a)(4).*

The combined representation provided by Williams and Curtis-Bauer was more than adequate to satisfy the applicable representation and due process standards. ER 108. The district court found that class counsel interviewed Williams thoroughly, discussed settlement terms with Williams prior to entering negotiations, and consulted and updated Williams during settlement negotiations. ER 109; *see also* ER 1374, 1377, 1380-81, 1383-87; PSER 854-56, 944-46, 951-52, 954, 957-61, 965, 968, 972. Through these discussions, class counsel acquired the information necessary to craft an appropriate settlement. ER 109. Months after Curtis-Bauer had become a named plaintiff, Williams rejected the settlement and chose to pursue her claims individually, *see* ER 1375-76; PSER 962, but until that time she acted as class representative for African-American FAs and was actively involved in the litigation. In determining whether the requirements of Rule 23(a)(4) were met in this case, her participation must be considered alongside that of Curtis-Bauer.
B. Due Process and Rule 23 Did Not Require Ms. Williams' Approval of the Settlement.

Objectors separately contend, without authority, that due process and Rule 23 were violated because Williams eventually opted out of the settlement negotiated by class counsel. This Court has held otherwise: "[C]lass counsel ultimately owe their fiduciary responsibility to the class as a whole and are ***39** therefore not bound by the views of the named plaintiffs regarding any settlement." *Staton*, 327 F.3d at 960. Williams had no right to veto the settlement simply because she was a named plaintiff. "[A] contrary view would put too much power in a wishful thinker or a spite monger to thwart a result that is in the best interests" of the class as a whole. *Saylor v. Lindsley*, 456 F.2d 896, 899-900 (2d Cir. 1972).

Even if a formal attorney-client relationship does not exist, class counsel has a fiduciary duty to putative class members prior to class certification. *Staton*, 327 F.3d at 960; *Dondore v. NGK Metals Corp*., 152 F. Supp. 2d 662, 665 (E.D. Pa. 2001); *In re McKesson HBOC, Inc. Sec. Litig*., 126 F. Supp. 2d 1239, 1245-46 (N.D. Cal. 2000).[FN14]

FN14. *See also Manual for Complex Litigation, Third*, § 30.24; Stephen B. Murray & Linda S. Harang, *Selection of Class Counsel: Is It a Selection of Counsel for the Class, or a Selection of Counsel with Class*?, 74 Tul. L. Rev. 2089, 2097 (2000); Douglas R. Richmond, *Class Actions and Ex Parte Communications: Can We Talk?*, 68 Mo. L. Rev. 813, 827 (2003).

Here, class counsel helped Williams file an EEOC charge in November 2006 on behalf of a class of minority FAs. From that point on, class counsel's duty ran to the class, not Williams alone, and class counsel had a duty to act in the best interests of the class. Where such a duty exists, courts hold that "named plaintiffs should not be permitted to hold the absentee class hostage by refusing to assent to an otherwise fair and adequate settlement in order to secure their individual demands." *Parker v. Anderson*, 667 F.2d 1204, 1211 (5th Cir. 1982) (affirming ***40** approval of Title VII settlement despite rejection by ten of eleven class representatives); *Staton*, 327 F.3d at 960; *Saylor*, 456 F.2d at 899-900.

Olden v. LaFarge Corp., 472 F. Supp. 2d 922 (E.D. Mich. 2007), *aff'd*, 294 Fed. Appx. 210 (6th Cir. 2008), is instructive. In *Olden*, there was "a breakdown of [class counsel's] attorney-client relationship that stem[med] from the desire of the class representatives to receive greater individual compensation in the form of banner awards at the expense of the class," and the class representatives objected to the settlement. *Id*. at 937. The court explained that, "because class counsel's obligations run to the class as a whole, the class representatives' assent is neither a sufficient nor a necessary condition to judicial approval of a class settlement." *Id*. at 931. Accordingly, class counsel could proceed with settlement notwithstanding the class representatives' objections, and a class representative substituted post-settlement was adequate. *Id. See also Heit v. Van Ochten*, 126 F. Supp. 2d 487, 494-95 (W.D. Mich. 2001) (granting motion to substitute new

named plaintiff post-settlement); *Fleury v. Richemont North America, Inc*., No. C-05-4525, 2008 U.S. Dist. LEXIS 64521, at *42-*45 (N.D. Cal. July 3, 2008).[FN15]

> FN15. The only distinction between this case and *Olden* is that the settlement here was negotiated before the complaint was amended to include class-wide claims of race discrimination. That the amended complaint had not been filed did not, however, change class counsel's obligations to the class as a whole, especially where class counsel had already assisted the named plaintiff in filing an EEOC charge containing the class allegations. Objectors' proposed requirement that class counsel file a class complaint before pursuing settlement negotiations or face the possibility of a named plaintiff unreasonably rejecting a beneficial settlement would serve no purpose, would needlessly add to the costs of litigation, and would increase the ability of a named plaintiff to hold the class hostage to his or her own self-interest.

***41** Class counsel properly considered the interests of the class when negotiating the settlement and when adding Curtis-Bauer as a named plaintiff to protect those interests. As the district court found, Curtis-Bauer evaluated the proposed settlement and suggested substantive provisions for inclusion in the settlement agreement. ER 327; *see also* PSER 992-94. Where, as here, class representation was adequate under Rule 23(a)(4) and the proposed settlement was fair, reasonable, and adequate under Rule 23(e), due process required no more.

C. Ms. Curtis-Bauer's Claims Are Typical of the Class Claims.

Under Rule 23(a)(3)'s "permissive standards," representative claims are typical "if they are reasonably co-extensive with those of absent class members; they need not be substantially identical." *Hanlon*, 150 F.3d at 1020; *Staton*, 327 F.3d at 957. "The purpose of the typicality requirement is to assure that the interest of the named representative aligns with the interests of the class.... The test of typicality is whether other members have the same or similar injury, whether the action is based on conduct which is not unique to the named plaintiffs, and whether other class members have been injured by the same course of conduct." *Hanon v. Dataproducts Corp*., 976 F.2d 497, 508 (9th Cir. 1992) (citations omitted).

***42** The district court did not abuse its discretion in finding that Curtis-Bauer's claims were "reasonably co-extensive" with those of the class. Curtis-Bauer was subjected to the same discriminatory account distribution system at Morgan Stanley as the other minority FAs in the class, and her claims flowed from the same factual, legal, and remedial theories as those of the class as a whole. That Curtis-Bauer also settled separate, non-class claims against Morgan Stanley does not demonstrate that her claims were atypical; class settlements often include separate awards for a named plaintiff's unique claims. "Settlement agreements in employment discrimination class actions may contain provisions awarding monetary recoveries and other special benefits to named plaintiffs for their unique claims." 8 *Newberg on Class Actions* § 24:129, at 505. Curtis-Bauer's individual claims of racial harassment do not undermine the typicality of her claims regarding Morgan Stanley's discriminatory account distribution system, because the latter are not different in kind or strength from those of the class. *See, e.g., Satchell v. FedEx Exp*., 2006 WL 3507913, at *1 (plaintiffs with non-class claims are not "non-typical").

Similarly, the claims of African-American and Latino class members are reasonably co-extensive. The groups were similarly affected by Morgan Stanley's practices and policies for distributing accounts, compensation, business opportunities, and opportunities for advancement, ER 348; PSER 466; the remedies provided in the proposed settlement agreement will benefit all class ***43** members in the same way; and any "disparities in compensation [were] not so great that it [was] unfair or inappropriate to treat African-Americans and Latinos in a similar fashion ...." ER 333. The minimal evidence on which Objectors rely is not properly before this Court, *see* Motion To Strike, and does not establish that the district court abused its discretion in determining, on the basis of the objective workforce data analyses provided by Plaintiffs, that the interests of African-American and Latino FAs were "reasonably co-extensive" for purposes of Rule 23(a)(3).

III. The District Court Did Not Abuse its Discretion in Granting Final Approval to the Settlement Agreement.

In determining whether to approve a proposed class settlement, the courts must give "proper deference to the private consensual decision of the parties," and involve themselves only "to the extent necessary to reach a reasoned judgment that the agreement is not the product of fraud or overreaching by, or collusion between, the negotiating parties, and the settlement, taken as a whole, is fair, reasonable and adequate to all concerned." *Hanlon*, 150 F.3d at 1027.

This Court reviews the district court's decision to approve a class settlement for a "clear abuse of discretion," according great weight to the views of the trial judge. *Officers for Justice*, 688 F.2d at 626. Because the courts must also defer to the parties' conclusion that a settlement is fair, adequate, and reasonable, this ***44** Court's review of a district court's approval of such a settlement is "doubly deferential." *Cf. Knowles v. Mirzayance*, 129 S.Ct. 1411, 1420 (2009).

A. The Settlement Was Reached after Arm's Length Negotiations, Plaintiffs Faced Considerable Risks at Trial, Experienced Class Counsel Considered the Settlement Proper, and Class Member Reaction Was Overwhelmingly Positive.

The settlement in this case was reached after extensive investigation and arms' length negotiations. *See supra* Section I.A. The district court properly considered this as a factor favoring final approval of the settlement. ER 111.

The district court also concluded that the risks faced by Plaintiffs at trial, the views of class counsel, and the reaction of the class all favored final approval of the settlement agreement. Objectors challenge none of these conclusions.

Any settlement must be evaluated with an understanding of the risks and benefits of going to trial. *See Officers for Justice*, 688 F.2d at 625. Here, the district court recognized the considerable risks Plaintiffs faced at trial, including difficulties in "proving that Morgan Stanley's objectively neutral policies and procedures caused the disparities in compensation and other harm, such as terminations based on low production." ER 111. To succeed on their § 1981 claims, Plaintiffs were required to demonstrate both that the practices and policies in question had a discriminatory purpose, *see General Bldg. Contractors Ass'n, Inc. v. Penn.*, 458 U.S. 375, 389 (1982), and that those practices and policies caused the injuries suffered by the class. "The uncertainty and complexity of ***45** proceeding to trial would be substantial," ER 111, while the settlement produced "a prompt, certain, and substantial recovery for the Plaintiff class," *id*.

Furthermore, as the court found, class counsel "have extensive experience not only with class action discrimination cases, but in litigating employment discrimination cases against defendants in the financial services industry." *Id.; see also* PSER 542-609, 615-17, 626-55. Class counsel's "considered and strong support for the efficacy of the proposed injunctive relief thus favored approval. ER 111.

Finally, the district court recognized that the reaction of the class to the settlement strongly favored approval. Of more than 1,300 class members, only nine lodged objections and only 24 opted out, while 422 submitted claims. ER 112. Counsel for Objectors below characterized this 31% participation rate as "very high." ER 59, 112 n.3. The positive reaction of the class demonstrates that the settlement is fundamentally fair, adequate, and reasonable, and rebuts any negative inference that might be drawn from Williams' decision to opt out.

B. The Injunctive Relief Is Substantial, Meaningful, and Valuable to the Class.

The district court also determined that "the Settlement Agreement provides substantial injunctive relief to the Plaintiff class." ER 112. As the court explained, that relief "is substantive, meaningful, and valuable to the class." ER 113.

***46** In challenging the district court's conclusion, Objectors first argue that the injunctive relief here is identical to the

relief in *Augst-Johnson*. However, the district court properly recognized that "the programmatic relief... represent[s] a genuine expansion of the relief already ordered in *Augst-Johnson*." ER 350. The proposed settlement ensures that the policy changes and new programs implemented as part of the *Augst-Johnson* settlement will benefit minority FAs, not just female FAs. For example, the industrial psychologists and the diversity monitor "will be devoting additional time, analysis, and resources to addressing race issues, and not displacing relief already agreed to in *Augst-Johnson" Id*.

In addition, one of the most important provisions -- the new Power Ranking formula -- was specifically revised in response to concerns raised by class counsel here. After learning of those concerns, "Morgan Stanley changed the Power Ranking formula to de-emphasize past performance, tested the revised Power Ranking formula to see if it would have an adverse impact on minorities, and found that it did not." ER 115. The development of a formula with no adverse impact on minorities resulted from settlement negotiations in both cases, not just *Augst-Johnson*.

This settlement also contains a number of provisions not found in the *Augst-Johnson* settlement. The settlement requires continuous monitoring of account distributions, compensation, and the Power Rankings of minority FAs, information that will be used to recommend changes. ER 155-56. The settlement also requires ***47** that Morgan Stanley take a number of specific steps to increase the recruitment of qualified diverse candidates, ER 151-52; requires reporting on the success of those recruiting efforts, ER 154; requires that Morgan Stanley implement a number of measures to improve its retention rates for minority FAs, ER 153, 161, 164-66; requires that that field managers report upon their diversity efforts and that senior management hold field managers accountable for those efforts, including through a meaningful diversity component of their compensation, ER 153-54; and requires the implementation of diversity training incorporating a tool designed to measure implicit bias, ER 153.

Objectors contend that the settlement agreement should have required that minorities be included on teams. The material relied upon by Objectors in support of this contention is not properly before this Court, *see* Motion To Strike, and, in any event, the settlement's failure to mandate minority inclusion does not establish that the district court abused its discretion in determining that the settlement as a whole was fair, reasonable, and adequate. "The proposed settlement is not to be judged against a hypothetical or speculative measure of what might have been achieved by the negotiators." *Officers for Justice*, 688 F.2d at 625. Here, "[t]he Settlement Agreement provides for some efforts to increase minority representation on teams and partnerships." ER 116. For example, the industrial psychologists are specifically charged with developing programs to increase the participation of minority FAs in partnerships. ER 164-65. "Given the extensive ***48** programmatic and monetary relief the settlement provides to class members," ER 116, class counsel's decision not to require additional changes to Morgan Stanley's teams and partnerships did not deprive the settlement of its significant value to class members.[FN16]

> FN16. The unpublished order cited by Objectors supports class counsel's conclusion because the court dismissed the plaintiff's claim that Morgan Stanley's team-formation policy involved a pattern and practice of discriminatory treatment. *See Dodson v. Morgan Stanley DW, Inc.*, No. C06-5669RJB, 2007 WL 3348437, at *6-*7 (W. D. Wash. Nov. 8, 2007).

C. The Monetary Relief Is Fair, Reasonable, and Adequate.

"[W]here monetary relief is but one form of the relief requested by the plaintiffs[,] [i]t is the complete package taken as a whole, rather than the individual component parts, that must be examined for overall fairness." *Officers for Justice*, 688 F.2d at 628. Nonetheless, when the monetary relief provided by the settlement here is examined on its own, it is clear that the district court acted within its discretion in approving the settlement.

The proposed settlement provides monetary relief in the amount of $16 million, plus interest at a rate of 5% per annum from the date of preliminary approval until ten days after resolution of all appeals. Because the district court granted

preliminary approval to the settlement more than 23 months ago, the value of the settlement fund has already increased by nearly $1.6 million -- an amount sufficient to cover the cost of claims administration, opt-out credits, and the payments to Curtis-Bauer, as well as a large portion of the attorneys' fees. After ***49** deducting these costs and fees, over $15.5 million now remains for distribution to the 422 class members who submitted timely and valid claim forms.

Objectors challenge the value of the settlement by cataloging the awards in other cases. Those settlements, however, were reached in cases involving different claims, different companies, different facts, and much larger numbers of class members. Some of the cases did not involve settlement funds at all, but instead required class members to participate in additional adversarial proceedings to recover. Comparisons to cases involving such widely different claims and facts are not meaningful or useful; each case must be evaluated in terms of the particular claims involved and settled, as the district court did here.[FN17]

> FN17. In the *Martens* case, which Objectors claim involved a $100 million recovery for class members, there was no settlement fund. The settlement instead provided an adversary arbitration proceeding to determine any particular individual's recovery. Only approximately 8% of the class members were willing to participate in this process. *Martens v. Smith Barney, Inc.*, No. 96 Civ. 3779, 2003 U.S. Dist. LEXIS 11587, at *16 (S.D.N.Y. 2003). With a total class of approximately 23,000 persons, the total recovery per class member in *Martens* averaged $4,347 -- slightly over one third of the average recovery in this case, assuming 100% participation, and slightly less than one eighth of the average recovery using the actual participation rate.

The only comparable case cited by Objectors is the *Augst-Johnson* gender discrimination case against Morgan Stanley, which involved compensation discrimination claims arising out of Morgan Stanley's account distribution and compensation policies. As the district court recognized, "the monetary relief [in this case] is comparable to that approved by the District Court for the District of ***50** Columbia in settlement of the parallel *Augst-Johnson* case." ER 117. Likewise, a comparable settlement involving Smith Barney settled for a similar amount of money. *See id*.[FN18]

> FN18. That *Augst-Johnson* involved Title VII rather than § 1981 does not reduce the value of that case relative to this case. Although Title VII has a shorter statute of limitations, the availability of a disparate impact theory of liability increases a plaintiff's likelihood of recovery in any case in which discriminatory intent will be difficult to prove.

Furthermore, the monetary relief provided in the settlement "represents over 40% of the predicted disparity in compensation which Plaintiffs sought as damages." ER 117. Objectors challenge the measure used by class counsel to evaluate potential damages at trial, but do so by pointing to damages that are theoretically available under law rather than those likely to be awarded in this case. "Back pay, front pay, emotional distress, and punitive damages" may technically be available, but class counsel could reasonably determine that it would be extremely difficult to certify and prove pattern and practice disparate treatment claims warranting such damages. Given the difficulty of proving that the class was owed any of the theoretically available damages listed by Objectors, class counsel reasonably discounted their value and based the damages calculation on the most easily provable and measurable form of damages. As the district court found, "Compensation shortfalls can be readily calculated, and the Parties can choose to have monetary relief focus on pay disparities rather than on constructive or actual terminations as a means of compromising a complex set of claims." ER 118.

***51** Finally, Objectors again challenge the uniform treatment of African-American and Latino FAs in the distribution formula. As before, the declaration on which Objectors rely is not properly before the court, *see* Motion To Strike, and does not establish an abuse of discretion. The district court reasonably determined that any disparities between the two groups were not so great that compensating African Americans and Latinos uniformly was unfair. *Id*. The Earnings Regression component of the formula minimizes any difference in recovery associated with the lower incomes of African-American FAs, ER 333, and any increased termination or attrition rate can be addressed through the termination

provisions of the allocation formula.[FN19] The district court did not abuse its discretion in determining that these provisions adequately accounted for any differences between the groups in terms of compensation and attrition rates, or in accepting class counsel's decision to base the monetary relief, in a case involving the compensation of minority FAs, on the amount of time that class members were receiving illegally reduced compensation while employed by Morgan Stanley.

> FN19. Under the allocation formula, each week worked at Morgan Stanley is worth one point, and class members may receive up to 50 additional points if they were terminated and up to 50 additional points if they suffered extreme emotional distress. A class member's termination and emotional distress points are therefore as valuable in the allocation formula as up to two years of employment.

***52** *IV. The District Court Did Not Abuse its Discretion in Denying Objectors' Request for Discovery.*

"The objector does not have an absolute right to discovery and presentation of evidence. The court, in its discretion, may limit the discovery or presentation of evidence" by an objector "to that which may assist [the court] in determining the fairness and adequacy of the settlement." 4 *Newberg on Class Actions* § 11:57, at 184; *see also Glicken v. Bradford*, 35 F.R.D. 144 (S.D.N.Y. 1964); *Manual for Complex Litigation, Fourth*, § 21.643 ("Discovery [by objectors] should be minimal and conditioned on a showing of need, because it will delay settlement, introduce uncertainty, and might be undertaken primarily to justify an award of attorney fees to the objector's counsel."). "The fundamental question is whether the district judge ha[d] sufficient facts before him to intelligently approve or disapprove the settlement." *Hemphill v. San Diego Ass'n of Realtors, Inc.*, 225 F.R.D. 616, 619-20 (S.D.Cal. 2005). Here, the district court properly exercised its discretion in denying the discovery requested by Objectors on the basis of its determination that "the Objectors [] had meaningful participation in the settlement proceedings, the Court ha[d] sufficient facts before it to intelligently evaluate the settlement, and discovery would cause unnecessary delay." ER 323.

Objectors sought the workforce data provided to Plaintiffs' counsel and used to generate its damages estimate, the Power Ranking formula and the adverse impact studies performed by Plaintiffs, the opportunity to depose or cross-examine ***53** Curtis-Bauer, and responses from Morgan Stanley to several questions relating to the injunctive relief. On appeal, Objectors argue that this discovery "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." AOB 56. However, Objectors point to no specific inadequacies in the record before the district court requiring additional discovery. In fact, most of the requested material -- such as Morgan Stanley's Power Ranking formula and Plaintiffs' studies of Morgan Stanley's workforce data -- was already before the court.

Objectors' desire to review that material for themselves does not establish that the record before the *district court* was inadequate. To the contrary, the record was far more extensive than necessary. *See supra* Section LB. The only arguably new evidence Objectors sought through discovery was Curtis-Bauer's testimony under cross-examination and Morgan Stanley's response to certain questions regarding the value of the injunctive relief. However, "Cross-examination of the affiants was not warranted; this [was] not a trial and the test of the evidence which the [c]ourt should receive on a settlement is whether the proffered proof is of a nature which will aid it in passing upon the essential fairness and equity of the settlement." *Glicken*, 35 F.R.D. at 148. Similarly, the requested responses would have been of little additional value to the district court, which specifically ***54** requested and received additional submissions from the parties regarding the value of the injunctive relief.

Objectors contend that the absence of formal discovery between the parties supported their request for discovery. However, the parties engaged in extensive informal discovery, generating a comprehensive factual record regarding the policies and practices at issue in the case. Contrary to Objectors' contention, Morgan Stanley did not select which data to provide to class counsel, but instead provided data specifically requested by class counsel. ER 849. Where, as here, "the evidence submitted in support of the settlement is the result of truly adversarial proceedings and where the

'comprehensiveness' of the records developed by the proponents [is great], the objector has a greater burden to show the necessity of additional evidence." *Hemphill*, 225 F.R.D. at 620. Given the extensive evidence before the district court, Objectors cannot meet that burden.

Objectors also assert that, under *Hemphill*, their "number and interests" supported their request for discovery. However, at the time of the court's decision, as now, the objectors represented a small percentage of the class -- less than two percent -- and the remaining class members had a strong interest in avoiding unnecessary delays. *See id*. at 620.

Finally, although Objectors assert that their request was well-founded, they identified no specific inadequacies in the record requiring additional discovery.

***55** None of the cases cited by Objectors remotely suggest that the district court abused its discretion in denying the requested discovery here. All involved specific inadequacies in the record that could only be remedied through additional discovery. In *In re General Motors Corp. Engine Interchange Litigation*, 594 F.2d 1106 (7th Cir. 1979), the Seventh Circuit found that the record raised serious questions regarding the settlement negotiations and that the trial court had therefore "abused its discretion by failing to undertake a careful examination of the conduct of the settlement negotiations and by preventing the plaintiff-objectors from showing that the negotiations prejudiced the best interests of the class." *Id*. at 1126, 1131. In *Hemphill*, the court granted the objectors' request for information that was relevant to the settlement and not in the record, 225 F.R.D. at 624, but denied the requests for information that was irrelevant or already in the record. In *In re Lorazepam and Clorazepate Antitrust Litig*., 205 F.R.D. 24 (D.D.C. 2001), the district court specifically *refused* to grant discovery comparable to that requested by Objectors -- namely, class counsel's damages analysis. *See also In re Domestic Air Transp. Antitrust Litig.*, 144 F.R.D. 421 (N.D. Ga. 2004) (granting objectors' requests only as to information required for consideration of the settlement's fairness but not in the record).[FN20]

> FN20. As the district court recognized, ER 334, this was not a case like *Acosta v. Trans Union LLC*, 243 F.R.D. 377, 397 (CD. Cal. 2007), *or Reynolds v. Beneficial Nat'l Bank*, 260 F. Supp. 2d 680 (N.D. Ill. 2003), in which class counsel engaged in almost no fact-finding and their performance fell below any objective standard of adequacy.

***56** Objectors' passing argument that the district court erred by failing to conduct an evidentiary hearing is similarly without merit. The only factual dispute discussed in the portion of the order cited by Objectors is a disagreement regarding Williams' "evolving reaction to the settlement terms." ER 109. As explained above, however, Williams' rejection of the settlement did not undermine the adequacy of class representation because she was informed of and consulted about the settlement process. *Id.*[FN21] The district court, following the procedures recommended by the *Manual for Complex Litigation* in all respects, provided Objectors with the opportunity to present evidence and to be heard at both the preliminary and final approval stages of the settlement process. It was required to do no more.

> FN21. Because Appellants' Opening Brief discusses no other alleged factual disputes, Objectors appear to concede that Plaintiffs adequately rebutted Ms. Williams' prior attempts to identify inconsistencies in the record. *See* PSER 847-49, 857-59.

CONCLUSION

For the reasons stated herein, Plaintiffs - Appellees respectfully ask this Court to affirm the District Court's orders denying Objectors' discovery requests, vacating its order for an evidentiary hearing, certifying the class of minority FAs, and granting preliminary and final approval to the class settlement.

Daisy JAFFE; 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; Theron Cyrus, Objectors - Appellants, v. Morgan Stanley & Co., Inc., Defendants - Appellees.
2010 WL 685874 (C.A.9) (Appellate Brief)

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