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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

DAISY JAFFE, et al., Plaintiffs, v. MORGAN STANLEY & CO., INC. Defendant.	Case No. C-06-3903 **OBJECTIONS OF PUTATIVE CLASS MEMBERS TO MOTION FOR CLASS CERTIFICATION & PRELIMINARY APPROVAL** Date: December 3, 2007 Time: 10:00 am Dept: Courtroom 12 Judge: Thelton E. Henderson

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OBJECTIONS OF PUTATIVE CLASS MEMBERS TO MOTION FOR CLASS CERTIFICATION AND PRELIMINARY APPROVAL OF PROPOSED SETTLEMENT

Putative class members and current and former Morgan Stanley & Co., Inc. ("Morgan Stanley" or "the Firm") employees Ronald Moore, Morris Allen, Jr., Michael Barnett, Anthony Bell, Patrick Carter, Martin Dixon, Ernest Dorsey, Mary Evans, Janice Grant, Mark Lewers, Maurice Mabon, Brian Roy, Marion Tucker, Carlton McDowell, and applicant Justin Harris, (collectively the "Moore group" or "Objectors") through counsel, respectfully submit their Objections to the Motion for Class Certification and Preliminary Approval of Proposed Settlement ("Settlement"). The Moore group is joined in its opposition by additional class members who have joined and signed a letter respectfully expressing their objections. *See* Exs. 6, 7.

FACTUAL AND PROCEDURAL BACKGROUND

I. Evolution of *Jaffe v. Morgan Stanley* and *Augst-Johnson v. Morgan Stanley* Lawsuits

On June 22, 2006, Daisy Jaffe filed this lawsuit alleging class-wide *gender* discrimination against Morgan Stanley and seeking to represent a nationwide class of female Financial Advisors ("FAs") and Financial Advisor-Trainees ("FA-Trainees") at Morgan Stanley. *See* Complaint, at Docket No. 1. Ms. Jaffe is Caucasian, and her complaint did not include any individual or class claims of race or color discrimination. *Id.* Ms. Jaffe's complaint did include an individual claim for age discrimination. *Id.*[1]

On the same day that Ms. Jaffe filed her complaint in this Court, a nearly identical gender discrimination lawsuit seeking class action status, *Augst-Johnson et al. v. MSDW,* Case No. 06-1142, was filed in federal district court in Washington, D.C. *See, e.g.*, 1/19/07 Order, Docket No. 67, at 1. From the record, it appears that the *Augst-Johnson* plaintiffs were in the midst of settlement negotiations with Morgan Stanley when the two lawsuits were filed. *Id.*

On October 12, 2006, the *Jaffe* complaint was amended to add an additional plaintiff,

[1] As of Tuesday, November 6, 2007, the lawsuit was still identified on the website of counsel for the *Jaffe* plaintiff as a gender discrimination class action. *See* Ex. 10.

Denise Williams, who also sought to represent a class of *female* FAs.[2] *See* First Amended Complaint, at Docket No. 25. As Plaintiffs informed this Court, "the central allegations of the complaint have not changed in any material respect. It remains a national gender discrimination class action challenging compensation and business allocation practices. Besides the new named Plaintiff, the only change is that the amended complaint adds overlapping and identical gender claims under Michigan law … on behalf of a Michigan subclass." *See* Docket No. 32 at 2.

Plaintiff Williams, an African-American, also brought "certain individual race discrimination claims, which have not been brought on behalf of anyone but Ms. Williams at this time." Docket No. 32 at 2. Indeed, Plaintiffs stated that "[c]ontrary to Defendant's assertions, the recently-filed Amended Complaint merely adds one plaintiff, who brings certain *individual* race claims not previously alleged, but does not in any way modify the original allegations challenging Morgan Stanley's nationwide pattern, practice and policy of discrimination against female Financial Advisors in compensation, business opportunities, and other terms and conditions of employment." *See* Plaintiffs' Opp. to *Ex Parte* App. to Continue Case Mgmt. Conf., Docket No. 32 at 1 (emphasis in original).

In January 2007, this Court ordered a stay of the *Jaffe* proceedings until March 15, 2007 after investigating the status of negotiations between the *Augst-Johnson* plaintiffs and Morgan Stanley. *See* Docket No. 67. On April 24, 2007, the *Augst-Johnson* parties moved for preliminary approval of a pre-certification settlement class of female FAs and FA-Trainees and a settlement agreement providing a monetary fund of $46 million and programmatic relief. *See* Ex. 13, *Augst-Johnson et al. v. Morgan Stanley* Settlement Agreement.

By stipulation of the parties and Court order, the *Jaffe* stay was extended again at least three times, to April 15, May 15, and August 6, 2007. *See, e.g.*, Docket No. 77, at 1, 3; *see also* Docket Nos. 73, 74, 75. The individual age and race claims of Plaintiffs Jaffe and Williams were also stayed. Docket No. 70, at 1. The District Court in Washington, D.C. preliminarily approved

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[2] According to the Amended Complaint, Williams is a Financial Advisor who began her employment at Morgan Stanley in March 2004. Docket No. 25, at 3.

the *Augst-Johnson* Settlement on July 17, 2007. Docket No. 78, at 2. Prior to August 2, 2007, neither the *Jaffe* Plaintiffs nor Defendant ever reported to this Court in any filing that the nature of the *Jaffe* lawsuit had changed from a putative gender discrimination class action lawsuit.

On August 2, 2007, counsel for the *Jaffe* Plaintiffs issued a press release announcing settlement of class race and color discrimination claims for 1,200 African-Americans and Latinos as part of their dormant putative gender class action lawsuit. *See, e.g.*, Ex. 11. Also on August 2, the *Jaffe* parties filed a Joint Status Report informing the Court that the settlement in the *Augst-Johnson* gender class action had been preliminarily approved, notice had been sent to the class, and a fairness hearing date had been scheduled. Docket No. 78 at 3. The parties further informed the Court that "Jaffe and Williams will no longer pursue their gender discrimination claims or seek certification of a class of female Morgan Stanley FAs." Docket No. 78 at 3. Instead, the *Jaffe* Plaintiffs sought to amend their First Amended Complaint to add another plaintiff, Margaret Benay Curtis-Bauer ("Curtis-Bauer"), and to add class-wide race and color discrimination claims.[3] *See* Joint Stipulation Re: Filing of Sec. Am. Cmplt., Docket No. 80 at 2, 7, 23.

The *Jaffe* Second Amended Complaint alleged for the first time claims of class-wide race and color discrimination on behalf of classes of African-American and Latino FAs and FA-Trainees. *See generally* Sec. Am. Cmplt., Docket No. 81. Ms. Williams was identified as a class representative for the African-American class for purposes of Title VII and Section 1981 claims, but not as a class representative for the "Minority" or Latino class. *Id.* at 5-6, counts 1, 2, 3, 4, 6, 8, 9. Ms. Curtis-Bauer was identified as a class representative solely for the Section 1981 claims for the "Minority" class, which included African-Americans and Latinos. *Id.* The Complaint did not identify any of the putative class representatives as Latino. *See id.* at 6.

The *Jaffe* parties claimed to have reached a settlement in principle of these class-wide race and color discrimination claims on August 2, 2007, despite the fact that no class race and color

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[3] According to the Second Amended Complaint, Curtis-Bauer is an African-American female who was employed as a Financial Advisor at Morgan Stanley from 1989 until November 2002. Docket No. 81, at 4, para. 15.

discrimination claims had been prosecuted before August 2, 2007. Docket No. 87. The terms of the settlement were not disclosed, nor was the settlement agreement filed with the Court at that time.

On August 30, 2007, Morgan Stanley's Human Resources department sent an e-mail to Financial Advisors entitled "A Message From Human Resources." *See* Ex. 12. This e-mail informed the employees of the "settlement of a race discrimination lawsuit filed on behalf of current and former African American and Latino" FAs and FA-Trainees and said the "details of the settlement will be made public upon the filing of the settlement papers with the U.S. District Court for the Northern District of California shortly." *Id.* The e-mail further stated that it anticipated "a number of inquiries from FAs regarding participation in this settlement" and directed all such "inquiries to the attorneys who filed the case" and listed the firm names and contact information for plaintiffs' counsel Kelly Dermody, James Finberg and Adam Klein. *Id.*

The *Augst-Johnson* settlement was approved by the D.C. Court on October 26, 2007. *See Augst-Johnson v. Morgan Stanley* Final Order Approving Settlement Agreement. The eligible *Jaffe* Plaintiffs (Daisy Jaffe and Denise Williams) opted out of the *Augst-Johnson* settlement.

Just before approval of the *Augst-Johnson* settlement – and nearly two months after first announcing the existence and settlement of the *Jaffe* class race discrimination claims – the *Jaffe* parties sought Class Certification and Preliminary Approval of the Proposed Settlement on October 22, 2007. *See* Docket Nos. 83, 85. As the Court is aware, the Proposed Settlement included a fund of $16 million, that includes (a) all payments to class members, including to the named plaintiff, (b) all attorneys' fees and costs, (c) all costs related to the Settlement (including but not limited to all costs related to notice, claims processing, legal and tax advice for the Fund Administrator, tax preparation, and the Special Master's fees and expenses), and (d) taxes. *See* Docket No. 87-2 at 52 (Stlmt. at 36). The Proposed Settlement also provides for programmatic relief nearly identical to that established by the *Augst-Johnson* gender class action settlement. *See generally* Ex. 13, at 18-31.

The parties agreed upon a class period beginning October 12, 2002, nearly five years prior to the date the Second Amended Complaint was filed and four years after the First Amended

Complaint added plaintiff Denise Williams, who did not allege class claims of race discrimination in that complaint, nor had she filed a representative EEOC charge alleging class-wide discrimination at that time. *See* Settlement and Sec. Am. Cmplt.

According to the Joint Motion for Order Granting Preliminary Approval, named *Jaffe* plaintiff Denise Williams now intends to opt out of the *Jaffe* race and color settlement and to pursue her own discrimination claims. See Docket No. 87 at 2, n. 2. ("Denise Williams has informed Class Counsel that she intends to opt out, and to file her own individual lawsuit alleging both the claims she has brought in the complaint and her attached EEOC charge….") Ms. Williams will not serve as a class representative. As a result, the class has a sole representative, Ms. Curtis-Bauer, who left the employ of Morgan Stanley in November 2002. *See, Jaffe* Sec. Am. Cmplt., at 5. Ms. Curtis-Bauer was therefore employed by Morgan Stanley for only about one month of the over five year class period. Ms. Curtis-Bauer is African-American and is not Latino.

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

On August 8, 2006 – nearly a year before the *Jaffe* Plaintiffs announced the existence and settlement of their class race discrimination claims – a group of African-American current and former Morgan Stanley FAs informed the Firm of their individual and class claims of race discrimination. These individuals made representative allegations "of a nationwide pattern and practice of intentional race discrimination by Morgan Stanley against African-American Financial Advisors and result from employment practices that have a disparate impact on African-Americans." Ex. 14, M. Stowell Letter.

The Moore group indicated its willingness to assist Morgan Stanley in addressing its systemic race discrimination and in exploring the possibility of resolving their individual and class claims without full-blown litigation. Morgan Stanley claimed to be interested in proactively addressing its problems and entered into tolling agreements with the Moore group's members so the parties could attempt to address these issues. These tolling agreement preserve the claims of the signatories and those similarly situated beginning August 6, 2006.

Other current and former employees joined the Moore group's efforts on behalf of

African-Americans at Morgan Stanley. On December 14, 2006, counsel for the Moore group met with lawyers for Morgan Stanley, including *Jaffe* and *Augst-Johnson* counsel Mark Dichter, in New York. Additionally, between April 24, 2007 and June 26, 2007, the Moore group met with Morgan Stanley representatives in Chicago and Washington D.C. to explain the systemic obstacles and patterns of discrimination facing African-Americans at Morgan Stanley. During these meetings, the parties engaged the services of a well-respected professional neutral, Linda Singer.

Morgan Stanley led the Moore group to believe, falsely, that the Firm was interested in improving the condition of African-Americans by reforming the policies, practices and hostile culture that disadvantaged African-Americans and instituting meaningful, company-wide relief for African-Americans. After it became clear to Morgan Stanley that the Moore group would not resolve class claims for insufficient monies and it became clear to the *Jaffe* lawyers that Morgan Stanley had settled the *Augst-Johnson* gender case, Morgan Stanley began negotiating with the *Jaffe* plaintiffs to settle yet un-filed class race discrimination claims as part of their dormant putative class action gender discrimination lawsuit. Only on August 1, 2007, did Mr. Dichter inform counsel for the Moore group of its negotiations with the *Jaffe* plaintiffs regarding class race discrimination claims.

As described above, on August 2, 2007, the *Jaffe* Plaintiffs issued a press release announcing settlement of the yet-unfiled class race discrimination claims. Tellingly, however, on August 1, 2007, the night before the *Jaffe* settlement was announced and the Second Amended Complaint filed, Mary Evans, an African-American producing Assistant Branch Manager in the Menlo Park office, received a phone call from an attorney for the *Jaffe* Plaintiffs, who appeared to be attempting to solicit her as a named plaintiff in the *Jaffe* case. *See* Ex. 9. Counsel for the Moore group is aware of other individuals subsequently receiving similar telephone calls from counsel for the *Jaffe* Plaintiffs.

Due to the manner in which the *Jaffe* settlement was negotiated and converted from a gender class, as well as Morgan Stanley's conduct while negotiating with them, the Moore group was concerned that the *Jaffe* settlement would not benefit the putative class of African-

Americans. Counsel for the Moore group shared their concerns with counsel for the plaintiffs, but those concerns fell on deaf ears. Worse yet, Morgan Stanley's attorney advised the Moore group's attorneys that if they challenged the lawsuit, they would be the "pariahs of the plaintiffs bar" because between the *Augst-Johnson* and the *Jaffe* lawsuits, five law firms sided with Morgan Stanley on settlement.

On October 3, 2007, the *Moore* group filed a lawsuit alleging individual and class claims of systemic race discrimination against Morgan Stanley, captioned *Moore et al. v. Morgan Stanley & Co., Inc.*, Case No. 07 C 5606 (N.D. Ill.). *See* Ex. 15, *Moore* Complaint. Unlike the *Jaffe* lawsuit, the *Moore* putative class includes applicants and producing managers and includes class-wide hiring and promotion claims. *See id.*

The fourteen named plaintiffs in the *Moore* lawsuit represent a broad cross section of Morgan Stanley employees. They include current and former Morgan Stanley FAs of varying levels of production and tenure, applicants and producing managers. Members of the *Moore* group have worked at over ten different Morgan Stanley offices across the country for a number of different managers. Collectively, the *Moore* group has a wealth of knowledge about the Firm and the manner in which its policies and practices operate to disadvantage and exclude African-Americans, and how to address these shortcomings. Presumably, all would be class members in the new *Jaffe* race and color class action, but none were consulted during negotiation of the claims of an entire class of African-Americans or in crafting appropriate relief.

LEGAL STANDARD

The district court plays a critical role in ensuring the fairness and adequacy of proposed class action settlements. A class action settlement may be approved only when its proponents meet their burden to show that it is fundamentally fair, adequate, and reasonable. *Linney v. Cellular Alaska Partnership*, 151 F.3d 1234, 1242 (9th Cir. 1998).

The Court must first determine that the proposed class meets the requirements for Rule 23 certification. *In re General Motors Corp. Pick-up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 794 (3d Cir. 1995). If the conditions for Rule 23 are met, the court must examine the settlement with special care and skepticism in those cases where the settlement was reached prior

to class certification. *Staton v. Boeing Co.*, 327 F.3d 938, 952 (9th Cir. 2003). This is so in part because pre-certification settlements present unique temptations and opportunities for collusion. *See, e.g., Simer v. Rios*, 661 F.2d 655, 664-66 (7th Cir. 1981) (requiring that settlement proponents show that the compromise met a higher standard of fairness where negotiations occurred before certification). Pre-certification settlements also merit heightened judicial scrutiny because the court must protect the interests of class members who are not yet notified of the action and therefore lacked any opportunity to ensure that their voices were heard during negotiations. *In re General Motors Corp.*, 55F.3d at 796 (discussing the problems presented by pre-certification settlements and the duty of courts to examine them with extra care).

ARGUMENT

I. The Proposed Class Does Not Meet The Rule 23 Standard for Certification, A Necessary Pre-Condition to Preliminary Approval.

Rule 23 governs the rights and obligations of parties who desire to bind not only themselves but also to resolve the claims of others. As a preliminary matter, to approve a pre-certification class settlement, the Court must first conclude that the proposed class meets the requirements for Rule 23 certification.

Morgan Stanley asks the Court to "conditionally" certify a class and award preliminary and final approval to the class settlement while allowing Morgan Stanley to retain the right to disavow the settlement if too many putative class members opt out. Under the express terms of the Settlement, Morgan Stanley has the right to return to the pre-settlement, pre-certification status quo. Presumably, Morgan Stanley could then object to class certification under Rule 23. The Settlement provides that Morgan Stanley alone shall decide whether the Settlement will proceed if the opt-out bar is exceeded. *See* Docket No. 87-2 at 30 (Stlmt. at 14, ¶9).

Rule 23, however, provides no special treatment or conditional certification for settlement purposes. The same Rule 23 requirements must be met for classes that settle and those that proceed to trial, and for good reason. If the parties settle, there is no adversary to test whether the case is proper for class certification. Yet for the absent class members, the impact of certification is the same, and a settlement extinguishes their claims. Here, the situation is magnified because

the parties settled the class suit before it was filed. Thus, the absent class members were notified with one press release that there was a putative class action and that it was resolved. There was no opportunity for absent class members to participate in the settlement discussions or to assist counsel with the remedial relief. If preliminary approval is granted, class members cannot object to the settlement and opt out. Thus, the only time for absent class members who disagree with the settlement to be heard is prior to preliminary approval.

The Moore group proposes that in the absence of a true adversarial process, the best way for the Court to determine whether to certify the class is to consider (1) what Morgan Stanley would argue against class certification if it were to disavow the Settlement and challenge the class, and (2) what the absent class members would argue if they had known this putative class was filed and had an opportunity to participate in the settlement discussions.

As explained below, were Morgan Stanley not seeking to settle this lawsuit, it surely would have argued that the lone class representative, Ms. Curtis-Bauer, is not an adequate class representative and that her claims are not typical of the class. Perhaps the most egregious aspect of the putative settlement is that the lone class representative negotiated for herself a payout of $125,000 from the class fund for "non-class claims," in addition to the $25,000 class bonus and her award from the Settlement. Had the Moore group participated in the settlement negotiations, they would have opposed the special treatment of one named plaintiff to the disadvantage of the class. For the reasons set forth below, Rule 23's requirement has not been met and the class should not be certified. The *Jaffe* plaintiff and Morgan Stanley should not be allowed to bind the absent class members. Because no class should be certified, the Court need not even consider the adequacy of the Settlement.

A. Ms. Curtis-Bauer Is Not An Adequate Class Representative.

Before approving a settlement, the Court must ensure that the named plaintiffs and class counsel have fairly and adequately protected the interests of the class. Fed. R. Civ. P. 23(a)(4). The proposed class includes all African-American and Latino FAs and FA-Trainees employed by Morgan Stanley since October 12, 2002. Docket No. 87-2, at 25. To properly understand and consider the ways in which any proposed relief would affect the class, and to negotiate fair and

effective equitable relief for all class members, the class should have been represented by African-American and Latino FAs and FA-Trainees of various levels of tenure and production. Because the Settlement seeks to extinguish promotion claims, class members denied promotions should have also been included in the negotiations and among the class representatives. Here, the sole class representative was a former employee who worked for Morgan Stanley during one month, the first month, of a class period that exceeds five years.

It does not appear that Ms. Curtis-Bauer participated in the settlement negotiations, but in any event, she is not an adequate class representative. Ms. Curtis-Bauer is African-American, and not Latino. The absence of a Latino class representative precludes a finding of adequacy of representation on behalf of Latino class members. *Payne v. Travenol Labs., Inc*., 673 F.2d 798, 810 (5th Cir. 1982) (holding that black males and black females were not interchangeable, so a black female could not be the sole representative for a class including black males); *see also Bartelson v. Dean Witter & Co.*, 86 F.R.D. 657, 669, (E.D. Pa. 1980) (noting that while not necessarily antagonistic, claims of other minority class members "would be asserted with less vigor than they deserve" by white female class representative).

Moreover, Ms. Curtis-Bauer was employed by Morgan Stanley only for the first month of a class period that dates from 2002 through 2007 and, thus, lacks knowledge as to the practices at issue during the vast majority of the class period and of the experiences of her fellow class members during that same time. As a result of her limited experience, she lacks sufficient knowledge of current practices necessary to critically assess the proposed injunctive relief (which will only apply prospectively to current and future employees).

Adequacy of representation also requires that the class representative and her counsel not have any conflicts of interest with the class. *Payne,* 673 F.2d at 810 ("It is axiomatic that a putative representative cannot adequately protect the class if his interests are antagonistic to or in conflict with the objectives of those he purports to represent") (internal citations omitted). Ms. Curtis-Bauer, as an African-American, may have a conflict of interest with Latino class members whom she seeks to represent. She also has a broader conflict because she is to receive additional payments and execute a different release than all other class members who participate in the

Settlement. While class members will, on average, receive payments of less than $12,000, Ms. Curtis-Bauer will receive over ten times that amount as a plaintiff in this lawsuit. In addition to a $25,000 bonus for serving as a class representative, Ms.-Curtis-Bauer is receiving $125,000 to settle her "non-class" claims despite her one-month employment during the class period. Docket No. 87-2, at 105 (Notice to Class at 15).

Class representatives cannot receive disproportionately special treatment. The size and nature of the additional relief for Ms. Curtis-Bauer is troubling. Payments for non-class claims should not be paid from a fund established to resolve class members' race discrimination claims. It is also unclear what other claims Ms. Curtis-Bauer could have that are still timely, given that she left Morgan Stanley in 2002.[4]

In *Staton v. Boeing Co*., 327 F.3d 938, 960 (9th Cir. 2003), the Ninth Circuit recognized that named plaintiffs have a stronger incentive to maximize their own recovery than to maximize the shared fund from which unnamed plaintiffs' awards will be drawn. *Id*. at 975. Where named plaintiffs receive special awards "in addition to their share of the recovery, they may be tempted to accept suboptimal settlements at the expense of class members whose interests they are appointed to guard." *Id*. Therefore, where, as here, the sole class representative negotiated a large and unique benefit for herself -- the settlement of her "non-class claims" for $150,000 to be drawn from the common fund -- it does not appear that the settlement is fair to all members of the class.

While Plaintiffs' Counsel may have done a commendable job negotiating a settlement for Ms. Curtis-Bauer, their fiduciary responsibilities are to the class as a whole, not just to the named plaintiffs, or to those class members who have contributed toward the prosecution of the suit. *Staton*, 327 F.3d at 960 (9th Cir. 2003) (noting that the "incentives for the negotiators to pursue their own self-interest and those of certain class members are implicit in the circumstances and

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[4] The nature of these "non-class" claims should be disclosed so that the Court can examine whether the additional $125,000 payment may have served as an improper incentive for Ms. Curtis-Bauer to support the class settlement. *Staton v. Boeing Co.*, 327 F3.d 938, 960 (9th Cir. 2003)

can influence the result of the negotiations without an explicit expression or secret cabals"). Allowing Ms. Curtis-Bauer to receive extra money from the fund for non-class claims raises questions about whether putative class counsel have adequately represented the class as a whole.

B. The Proposed Class Does Not Meet The Rule 23 Requirements of Typicality.

A class representative's claims should be typical of those of the class. First, the payment that Ms. Curtis-Bauer is receiving for her non-class claims is many times what she and class members will recover for their race and color discrimination claims. Ms. Curtis-Bauer's "other" individual claims appear to predominate over her race discrimination claims, so they cannot be typical of the class. *See, e.g., O'Neal v. Wackenhut Servs. Inc.*, No. 03-397, 2006 U.S. Dist. LEXIS 34634, at *57 (E.D. Tenn. May 25, 2006) (refusing to certify a class because the named plaintiffs' claims were noticeably weaker than those of most class members and were therefore atypical).

Second, the race discrimination claims of Ms. Curtis-Bauer, an African-American, are not necessarily typical of those of Latino class members. The parties have not explained the basis for their decision to create a single "race and color" class for all discrimination claims of African-Americans and Latinos. Under the circumstances, it does not appear that typicality can be met under Rule 23(a) by conflating a class of African-Americans and Latinos. *See, e.g., Bartelson v. Dean Witter & Co.*, 86 F.R.D. 657, 669 (E.D. Pa. 1980) (denying class certification for minority class and holding that white female class representative's claims were not typical of the claims of blacks and other minority groups). It is naïve and dangerous to assume that Latinos and African-Americans necessarily have the same experiences, and the same claims, or that the discrimination they face can be remedied with the same programs.

Based on the experiences of the Moore group, the challenges and patterns of discrimination that face African-Americans are different than those that face Latinos at Morgan Stanley. The parties have not disclosed any analysis of Morgan Stanley's workforce data, even to disclose the relative size and representation of African-Americans and Latinos in the proposed class. This data should be available to the Court and class members. This data, properly analyzed, would likely reveal the experiences of the two groups. The Moore group understands

that African-Americans fare far worse under Morgan Stanley's policies and culture than do Latinos. On information and belief, African-Americans have lower representation as FAs and in management, lower compensation and higher rates of attrition than Latinos and certainly than Caucasians.

II. The Proposed Settlement Does Not Meet The Standard For Preliminary Approval.

Assuming, arguendo, that the class is certified, the Court should deny preliminary approval to the Settlement because it is not adequate, fair or the product of arms'-length negotiations. To grant preliminary approval, the court must determine that the proposed settlement "is based upon findings that (a) the negotiations occurred at arm's length; (b) there was sufficient discovery; (c) the proponents of the settlement are experienced in similar litigation; and (d) only a small fraction of the class objected." Special Master's Report, Livingston v. Toyota Motor Sales, USA, Inc., No. C-94-1377, 1995 U.S. Dist. LEXIS 21757, at *24 (N.D. Cal. June 1, 1995), adopted at *Wolf v. Toyota Motor Sales, USA, Inc.*, No. C-94-1377, 1997 U.S. Dist. LEXIS 16457 (N.D. Cal. Sep. 24, 1997). Here, it does not appear that the negotiations occurred at arms' length or that sufficient discovery was exchanged, resulting, predictably, in an inadequate and unfair settlement, as well as objections by a substantial number, 20, of class members. See, e.g., Exs. 1-7. Class Member Letters to Court.

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

A number of facts demonstrate that the settlement was not negotiated at arm's length. The *Jaffe* lawsuit was filed as a class action gender discrimination lawsuit, and converted to a race and color class case only after the plaintiffs' lawyers lost the gender case to a competing group of plaintiffs and lawyers in the *Augst-Johnson v. Morgan Stanley* case.[5] The *Jaffe* settlement was announced the same day the parties sought to amend the complaint to first include class claims of

[5] Indeed, as set forth on p. 2, *Jaffe* plaintiffs repeatedly represented to the Court that theirs was a class-wide gender case, including when the lawsuit was amended to add plaintiff Denise Williams. As late as November 5, 2007, the Jaffe case was still described on class counsel's website as a gender class action. *See* Ex. 10.

race and color discrimination, some 14 months after the lawsuit was originally filed.[6]

It does not appear that any putative class members or their representatives (other than counsel) engaged in any negotiations of the *Jaffe* settlement, much less arm's length negotiations, before a settlement was reached. Unlike the Moore group, who attended a series of mediations with Morgan Stanley, the *Jaffe* class representative was not present at the mediations that resulted in the race and color settlement. Indeed, there is no evidence that Curtis-Bauer, the sole remaining class representative, played any role in the negotiations resolving the claims of the class she seeks to represent. And there is no evidence *any* Latino putative class member participated in the case at any time.

Further, at the time the *Jaffe* settlement was reached, only one of the two named plaintiffs was African-American. That plaintiff, Denise Williams, is no longer serving as a class representative and has announced her intent to opt out of the race and color settlement to pursue her own individual discrimination claims. *See* Docket No. 87-1 at 2 n.2. The decision of Williams to relinquish her class representative status casts doubt on the credibility and fairness of the negotiations – as well as the terms of the settlement.

Other putative class members were not contacted until the deal was done. For example, on August 1, 2007, the night before the *Jaffe* settlement was announced and the amended complaint filed, Mary Evans, a Financial Advisor and Assistant Branch Manager of the Menlo Park Morgan Stanley office, received a phone call from a Lieff Cabreser attorney who appeared

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[6] It appears that Morgan Stanley orchestrated this eleventh hour conversion in part to silence the *Jaffe* plaintiffs and their attorneys, who would have been the most likely to object to the *Augst-Johnson* gender lawsuit and to achieve a global resolution of all civil rights claims against the Firm for the foreseeable future. Having previously sought to represent the same class, the *Jaffe* plaintiffs and their lawyers were in the best position to object to the *Augst-Johnson* settlement. However, prior to the *Augst-Johnson* opt-out period, the *Jaffe* case was converted into a "race and color" class settlement that mirrored the *Augst-Johnson* settlement. Morgan Stanley's offer to the *Jaffe* plaintiffs to settle a race discrimination class left little incentive for them to challenge the *Augst-Johnson* case, which was inextricably linked to their own lawsuit. Apparently, however, neither of the named *Jaffe* plaintiffs believed the *Augst-Johnson* settlement was in their best interest, as they both opted out of the settlement. As a result of these machinations, the *Augst-Johnson* case was settled at an artificially low value as compared to other similar broker class action lawsuits.

to be attempting to solicit her as a named plaintiff in the *Jaffe* case. *See* Ex. 9, Declaration of M. Evans. The Moore group suspects that Curtis-Bauer, like Ms. Evans, was contacted only *after* the settlement was reached by Morgan Stanley and counsel for the *Jaffe* plaintiffs. As previously explained, Ms. Curtis-Bauer is not an adequate representative regardless of her participation in the negotiations.

Plaintiffs' counsel are apparently still searching for named class representative plaintiffs. As recently as last week, an attorney from Lieff Cabreser contacted a putative class member and asked whether he would be interested in serving as a named plaintiff and class representative in the *Jaffe* lawsuit and would write a letter to this Court supporting the settlement. *See* Ex. 8, Decl. of M. Miller. The attorney provided the class member with inaccurate and incomplete information about the Settlement. She did not inform the class member that one of the named plaintiffs had decided to opt out of her own lawsuit to pursue her race discrimination claims individually and sent him a Settlement agreement that included Ms. Williams as a named plaintiff and class representative.[7] *Id.*

Further evidencing the lack of arm's length negotiations, Plaintiffs' counsel is relying on Morgan Stanley to garner support for the settlement. After the *Jaffe* Settlement was reached, Morgan Stanley sent an e-mail to all class member employees with the names, firms and contact information of Plaintiffs' attorneys and directed class members to call Plaintiffs' counsel with questions.[8] Ex. 12. Support by class members *after* the settlement was reached, however, does not diminish the importance of the lack of class member input and involvement during the negotiation of the Settlement.

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[7] Plaintiffs' counsel are apparently also trying to garner letters of support from class members for the settlement to present to this Court. *See, e.g.*, Ex. 8, M. Miller Decl. Plaintiffs' counsel has a duty to provide full and fair disclosures to class members about the lawsuit and the settlement but are not doing so as part of their outreach effort and solicitation of "support." *See id.* Any support can only be meaningful if it is based on full and complete information about the history of this litigation, the terms of the settlement, its impact on themselves and other class members, and the concerns of the Moore group.

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

Perhaps the most astonishing evidence of the lack of arm's length negotiations is the parties' decision to include Latinos as part of the class. None of the named plaintiffs are Latino, and the class lacks a Latino class representative. The Moore group understands that the working conditions, experiences, and outcomes for African-Americans and Latinos vary widely at Morgan Stanley, as does their compensation and rates of attrition and representation. As a result, different relief may be appropriate. The willingness to negotiate and accept a settlement on behalf of a class of Latinos without the benefit of at least one Latino class representative is inconsistent with an arm's-length negotiations process. Rather, Morgan Stanley's inclusion of Latinos in the class definition appears designed to mask the low numbers of African-Americans at the Firm, dilute the ability of African-Americans to challenge the proposed settlement, and to release the claims of (and the Firm's liability for) a vast majority of its minority employees, including Latinos.

Given the facts, Morgan Stanley's decision to negotiate with the *Jaffe* Plaintiffs' counsel is unsurprising. Morgan Stanley chose not to negotiate with the Moore group because it was not interested in a fair resolution negotiated at arm's-length that would actually benefit African-Americans and result in meaningful change at the Firm. Thus, Morgan Stanley converted a Settlement in the gender case that it wished to implement to limit liability for its rampant race discrimination. Morgan Stanley was well aware that the Moore group would not agree to one-sided terms and insufficient relief for African-Americans, nor would they agree to release the rights of Latinos, and would litigate rather than accept relief that would not benefit other African-Americans but would restrict their rights. Morgan Stanley therefore went searching for plaintiffs who would accept the inadequate settlement.

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

The *Jaffe* Settlement was reached without any formal discovery and without any meaningful involvement of class members. Although the parties contend that Morgan Stanley provided certain information as part of the mediation process, including workforce data, this information was not produced under the Court's discovery rules nor made available to class members. When combined with the lack of involvement of class members in the mediation and

settlement process, this discovery failed to provide sufficient basis for an appropriate settlement.

Further, it does not appear that Morgan Stanley provided the *Jaffe* plaintiffs with meaningful information to make decisions on behalf of unnamed class members. For example, Morgan Stanley did not inform Plaintiffs or their counsel about the existence of the Moore group or the nature of their claims. Morgan Stanley's failure to disclose this key piece of information undermines the reliability of any information exchanged informally.

Moreover, it appears that Plaintiffs' counsel ignored the relevant information gleaned from even the modest information provided. Specifically, during a phone conference with counsel for the Moore group, counsel for the *Jaffe* Plaintiffs conceded that the workforce data revealed significant differences in the outcomes for African-Americans and Latinos, including their representation, retention, and compensation. Nevertheless, Plaintiffs' counsel agreed to include Latinos in the class, even without a representative to protect their interests, so that Morgan Stanley could cross another group of potential plaintiffs off of its list.

III. The Proposed Settlement Is Not Fair or Adequate To The Class.

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

Morgan Stanley seeks to release the claims of approximately 1,300 African-American and Latino Financial Advisors and Trainees for a Settlement Fund of $16 million. This Fund is grossly inadequate and will not provide meaningful relief or adequate compensation to the victims of the Firm's systemic racial discrimination, nor will it provide any incentive for the Firm to address its entrenched discriminatory practices and culture.

The $16 million Fund pales in comparison with amounts recovered for class members in other cases in the retail brokerage industry. For example, in *Cremin v. Merrill Lynch*, Case No. 96 C 3773 (N.D. Ill.), a similar nationwide gender discrimination class action lawsuit against another retail brokerage firm, 900 claimants recovered in excess of $225 million. The *Martens et al. v. Smith Barney*, Case No. 96 C 3779 (S.D.N.Y.), gender discrimination lawsuit yielded over

$100 million for class members.[9] Other nationwide race discrimination class action lawsuits against major companies such as Coca-Cola and Texaco have resulted in far greater relief for a comparable number of class members, approximately $193 million and $115 million, respectively.

The proposed settlement fund is inferior even to other recent class action settlements by Morgan Stanley. The *Augst-Johnson v. MSDW* gender discrimination class action settlement established a settlement fund of $46 million, a value that appeared artificially low as a result of competition between that case and the *Jaffe* gender case. In the *Schieffelin v. Morgan Stanley* gender discrimination lawsuit, a class of 340 women in the Firm's institutional equities division recovered $54 million for gender discrimination claims plus a separate recovery for attorneys' fees. Morgan Stanley recently settled a Fair Labor Standards Act case brought on behalf of brokers in a single state, California, for $42.5 million. If anything, the race and color claims at issue in this lawsuit under Section 1981 are more valuable than the gender discrimination claims under Title VII given that Section 1981 has a longer statute of limitations and no cap on compensatory damages.

Aggravating the problem, a substantial portion of the Settlement Fund will not be available to class members, as it will be depleted for payments to the named plaintiff, all attorneys' fees and costs, all costs related to the Settlement (including for notice, claims processing, legal and tax advice and preparation, and the Special Master's fees and expenses), and taxes. *See* Docket No. 87-2 at 52 (Stlmt. at 36). The Settlement neither specifies these fees and costs, nor sets limits on fees and costs to be paid from the Fund. The Settlement also allows for Morgan Stanley to receive a "credit," further reducing the Settlement Fund, if more than an undisclosed number of class members opt out. See Docket No. 87-2 at 30 (Stlmt. at 14). It is

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[9] Morgan Stanley sought to justify the comparatively low *Augst-Johnson* settlement gender settlement fund by asserting, essentially, that the industry's treatment of women had changed in the decade since the large *Cremin* and *Martens* cases. Without conceding the accuracy of this statement, the same cannot be said about the discriminatory treatment of African-Americans. Based on the Objectors' experiences at Morgan Stanley and knowledge of the industry, conditions for African-Americans at Morgan Stanley have not improved in the last decade.

therefore not possible for this Court or class members to assess what amount will actually be available for relief to class members.

In any event, the relief for an individual class member will be grossly inadequate. Putative Class Counsel have requested approximately $1.55 million for attorneys fees. Docket No. 87-2 at 105 (Notice to Class at 15). After subtracting just these attorneys' fees, and without consideration of any other costs and fees that will come from the fund, class members could receive a maximum of $11,000 on a pro rata basis for discrimination suffered over a period exceeding five years. This amount is trivial compared to the losses suffered by class members, and in light of the Firm's rampant discrimination and the fact that the annual earnings of Morgan Stanley's FAs routinely exceed $200,000.[10] Because of their high earnings potential, it is not uncommon to see discrimination verdicts for individual Financial Advisors in the millions. *See, e.g.*, Ex. 16, *Sumner v. Merrill Lynch* (sex discrimination verdict of $2.2 million); *Keys v. Smith Barney* (sex discrimination verdict of $3 million); *Flockhart v. Iowa Beef Processors*, 192 F. Supp. 2d 947, 979 (N.D. Ia. 2001) (damages in excess of $500,000 awarded in individual sex discrimination case where plaintiff, a supply clerk, earned under $10 per hour).

The inadequacy of the Settlement's financial provisions is also demonstrated by the actions of the named plaintiffs. One of the best tests of the fairness of a proposed settlement is whether the named plaintiffs and class representatives will agree, without added incentives or side-deals, to participate in the settlement on the same terms as other class members. Plaintiff Williams apparently concluded that the proposed settlement would not provide sufficient relief for her legal claims and has opted out of the *Jaffe* Settlement to pursue her individual claims of discrimination. Plaintiff Curtis-Bauer has not been forced to stand in the shoes of the class in order to gauge the fairness of the Settlement, as she will receive an additional $150,000 in payments from the fund that are not available to other class members. Without these additional

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[10] These damages include denial of business opportunities and management positions and loss of FA positions. Damages that result from discriminatory terminations and constructive discharge can also be substantial, including losses of a broker's book of business. *See, e.g.*, Ex. 5, Ltr. from M. Mabon.

payments, would Ms. Curtis-Bauer have accepted this Settlement as fair to her or to absent class members?

B. The "Programmatic Relief" Is Inadequate Because It Was Not Negotiated By Adequate Class Representatives And Does Not Constitute Consideration For This Lawsuit.

The Moore group anticipates that much emphasis will be placed on the Programmatic Relief by the proponents of the Settlement. However, the Programmatic Relief was not negotiated as part of *this* Settlement, as it is nearly a carbon copy of the relief set forth in the *Augst-Johnson* gender discrimination settlement. Morgan Stanley is legally obligated to implement the vast majority of this relief under the *Augst-Johnson* consent decree, regardless of whether the *Jaffe* settlement is approved, including company-wide policies that apply to all FAs, regardless or race or color. As a result, it cannot be consideration for the relinquishment of class members' rights in this case. Morgan Stanley cannot use as consideration in two different lawsuits the same programs or funds.

For example, proponents of the Settlement herald the Power Ranking system and account distribution policy, yet concede that these same policies were presented to the *Augst-Johnson* class and as part of that settlement. Clearly, if Morgan Stanley is obligated to follow the Power Ranking, it cannot constitute the consideration for this Settlement.

Comparing the diversity initiatives presented in *Augst-Johnson* to those presented here confirms that there are few new obligations undertaken by Morgan Stanley that are above and beyond what has been ordered by the Court in *Augst-Johnson*. Nevertheless, Morgan Stanley attempts to "double-count" the $7.5 million value of this relief designated under the *Augst-Johnson* consent decree. Thus, Morgan Stanley simply seeks to settle two claims for the price of one. As an analogy, no Court would allow Morgan Stanley to deplete the *Augst-Johnson* common monetary fund to satisfy race or color claims. Yet what Morgan Stanley proposes is that without notice to the *Augst-Johnson* class the same consultants and diversity monitors address both gender and race or color concerns. Clearly, the *Augst-Johnson* class was never told that the initiatives would have to satisfy not only gender concerns but race or color as well. The flip side of this situation is that sharing the *Augst-Johnson* programmatic relief not only

shortchanges the *Augst-Johnson* class, it also deprives the *Jaffe* class of its own independent consultants and narrowly crafted programmatic relief to address the problems of race or color discrimination.[11]

Second, because the class was not adequately represented during the negotiations, the Programmatic Relief was not negotiated by or with the assistance of knowledgeable class members, like the Moore group, with a broad range of experiences and insight. Morgan Stanley's one-size-fits-all approach to "diversity" demonstrates it's misunderstanding of the obstacles facing its African-American and Latino employees. The working conditions and treatment of women and African-Americans at Morgan Stanley are not identical, nor are the reforms necessary to change the Firm's discriminatory practices and attitudes the same. For example, due in part to the low numbers of African-Americans, the isolation of and hostility faced by African-Americans at Morgan Stanley is not a phenomenon systematically faced by women at Morgan Stanley. Likewise, African-Americans face the additional hurdle of the racial steering of clients. The Moore group understands that the results for African-Americans in terms of compensation and attrition disparities are dramatically worse under Morgan Stanley's discriminatory practices and culture than for nearly any other demographic group. Involvement of those directly affected by these practices is essential to developing effective solutions.

Likewise, Morgan Stanley has shut out the class members in both *Augst-Johnson* and *Jaffe* from challenging the Power Ranking because Morgan Stanley refuses to disclose the Power Ranking. Indeed, even though the Power Ranking has been approved by the *Augst-Johnson* consent decree, Morgan Stanley and the putative Class Counsel filed the Power Ranking under

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[11] The Settlement seeks to double-count the same (inflated) $7.5 million value the parties placed on the identical relief in the *Augst-Johnson* settlement. *See, e.g.*, Ex 13, *Augst-Johnson* Stlmt at 41; *Jaffe* Stlmt at 46. The few provisions that do vary from the *Augst-Johnson* settlement merely is a change the words from "women" to "African Americans and Latinos." Compare, for example, Section VII.C.4.b of the *Augst-Johnson* Settlement ("The Industrial Psychologists shall make recommendations for increasing participation of women in the receipt of retiring Financial Advisor's [*sic*] books of business") with Section VII.D.4.b of the *Jaffe* Settlement ("The Industrial Psychologists shall make recommendations for increasing participation of African Americans and Latinos in the receipt of retiring Financial Advisor's [*sic*] books of business").

seal in this case. Thus, the only challenge that the Moore group can launch to the Power Ranking is a general challenge to the concept of a Power Ranking. Had the Moore group been allowed to participate in the discussion about whether a Power Ranking should be adopted to distribute accounts, they certainly would have argued that until the gap in wages between African-American and white FAs narrows, awarding points based on commission generated or assets under management only institutionalizes and perpetuates the bias.

Further, it follows that if African-Americans are excluded from partnerships, and assets of retiring FAs transfer through teams, African-Americans are disadvantaged by teams. The transfer of team assets takes place as an exception to the Power Ranking but taints future Power Rankings. FAs who receive assets through teams generate more commissions and increase their Power Rankings. The Moore group certainly would have argued that until progress is made under the Programmatic Relief, no Power Ranking should be used.

Finally, while meaningful injunctive relief should be a part of any resolution, it is important to acknowledge the limitations of such relief. For years, Morgan Stanley has had a high and racially disproportionate rate of attrition of African-Americans, allegedly over 80%. Any programmatic relief will not benefit the majority of the class that has been driven out of Morgan Stanley and whose careers have been irreparably harmed as a result of the Firm's rampant discrimination. Thus, for those class members, the only relief is monetary.

C. The Settlement Is Inadequate Because It Does Not Ensure Access To Courts For Discrimination Claims And Excludes FAs With Management Responsibilities From The Class.

1. Any Meaningful Settlement Should Include Morgan Stanley's Agreement To Maintain Class Members' Access to Court for Discrimination Claims.

One of the most meaningful reforms brought about by litigation in the 1990s against Wall Street firms was the end to mandatory arbitration of all claims before the National Association of Securities Dealers and the New York Stock Exchange. Most employees of retail brokerage firms now have the right to pursue their civil rights claims in the courts with full due process rights, but some firms are attempting to return to mandatory arbitration and class action bans. Morgan Stanley represents that it has an internal dispute resolution process that does not mandate

arbitration of civil rights claims. Any meaningful settlement should include Morgan Stanley's agreement to continue to provide employees access to court, and not mandatory arbitration of their civil rights claims, for the duration of any consent decree.

2. The Class Definition Is Unfairly Restrictive.

The class consists of FAs and FA Trainees at Morgan Stanley, but does not include FAs who also hold management titles or responsibilities, such as Sales Managers, Assistant Branch Managers, or FAs "In Charge" of Morgan Stanley offices. The settlement definition is too narrow, as most of these "assistant" manager positions are, in fact, held by Morgan Stanley employees who continue to manage a retail book of business, and thus act as both FAs and managers. These "producing" managers are equally subjected to Morgan Stanley's discriminatory practices and should not be excluded from seeking relief for the harm they suffered as a result of race discrimination.

IV. The Proposed Notice Is Confusing and Inaccurate and Does Not Provide Class Members Adequate Information Or Opportunity To Exercise Their Rights.

The Proposed Notice is confusing and inaccurate and would mislead class members about the terms of the Settlement and their options. The inaccuracy in the Notice does not meet due process requirements. *Silber v. Mabon*, 957 F.2d 697, 700 (9th Cir. 1992); *Wright v. Collins*, 766 F.2d 841, 848 (4th Cir. 1985). Most notably, the Notice does not clearly or accurately describe what claims a class member will release and what award they can expect to receive, or how that award will be calculated. *See, e.g.,* Docket No. 87-2, Notice at ¶ 7, at 12-13. The Notice does not inform class members how much of Fund will be available to the class, or what a class member can reasonably expect in terms of an award.[12] The Allocation Formula is confusing and does not include information necessary for class members to assess whether they should participate in the settlement or opt out. For example, class members are unlikely to know, or have access to information explaining, whether their earnings are more or less than two standard

[12] Other than the $1.55 million in attorneys fees, and the $150,000 additional payment to the named plaintiff, no other information is disclosed as to the amount of fees, costs, and expenses that will be paid from the funds and not available to class members.

deviations above Caucasian mean earnings, and consequently whether they are eligible for any monetary award for the Earnings Regression Component of the formula. Further, this formula does not consider the possibility that high performing African-Americans could have been discriminated against as compared to high earnings non African-Americans, nor does it appear to control for or take into account factors that would be necessary to value earnings disparities for appropriate comparators.

The Notice and Settlement also describe very different Allocation Formulas for the determination of class member settlement awards. *Compare* Docket No. 87-2 at 39-40 (Stlmt. VIII.D. at 39), with Notice, Docket No. 87-2 at 103 (Notice at 8, 13-14). Settlement awards to class members will be largely determined by a Claim Form Survey, which is 85% of the award Allocation Formula. The Notice provides:

> Points for the Claim Form survey will be allocated as follows: (1) Each claimant will receive 1 point for each week worked between October 12, 2002 and [preliminary approval date]…, (2) Claimants will be eligible for up to 50 points for responses to questions … about extreme emotional distress; and (3) Claimants will be eligible for up to 50 points for responses to questions on the Claim Form about termination and constructive discharge.
>
> Docket No. 87-2 at 103 (Notice, ¶8 at 13) (also providing example of calculation).

The Settlement provides a different formula and calculation that includes no mention of points for weeks employed by Morgan Stanley, and states that the:

> Special Master shall make allocations under the Claim Form survey component by taking into consideration: (1) information provided by Class Counsel and information contained in the Claim Form submitted to the Special master concerning the Claimant's (1) individual contribution to the prosecution of this action; (ii) individual statements of alleged race and/or color discrimination presented on the Claimant's Claim Form; (iii) individual statements supporting an award of compensatory damages; and (2) the release of individual claims that go beyond the scope of the settled claims.
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> Docket No. 87-2 at 55 (Stlmt, VIII.D.2. at 40)

Class members' awards could vary significantly under these two approaches, and class members are entitled to accurate information in deciding whether to support or participate in the settlement.

The Notice also provides inadequate time for class members to opt out, object, or file a claim. The parties have proposed sending notice in December. Particularly in light of the holiday

season, when many people travel, a number of class members may not receive timely notice. Given the length and lack of clarity of the Notice and the important issues involved, class members need adequate time to review and consider the materials and their options, consult with an attorney if they so choose, and draft opt-outs, objections, or prepare and submit the fairly extensive claims forms.

CONCLUSION

For the reasons stated herein, among others, the parties' motion to preliminarily approve the proposed settlement, provisionally certify the settlement class, issue notice, and order a schedule for the settlement approval process should be denied with prejudice.

Dated: November 9, 2007

STOWELL & FRIEDMAN

By: /S/ Mary Stowell
Mary Stowell (*Pro Hac Vice Pending)*

Dated: November 9, 2007

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