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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

DAISY JAFFE, DENISE WILLIAMS, and MARGARET BENAY CURTIS-BAUER, on behalf of themselves and all others similarly situated,

Plaintiffs,

v.

MORGAN STANLEY DW, INC.,

Defendant.

Case No. C 06-3903 TEH

<u>CLASS ACTION</u>

REPLY MEMORANDUM OF PLAINTIFF CURTIS-BAUER IN SUPPORT OF MOTION FOR PRELIMINARY SETTLEMENT APPROVAL AND CLASS CERTIFICATION

Date: December 3, 2007
Time: 10:00 a.m.
Location: Courtroom of the Hon. Thelton E. Henderson

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INTRODUCTION

The question before this Court on Plaintiffs' Motion for Preliminary Settlement Approval is whether the proposed settlement is within the range of reasonableness such that notice to the class of the settlement terms is appropriate. The answer is yes.

The proposed settlement, which was negotiated at arms-length by experienced and informed counsel over many months in mediation sessions presided over by a skilled and experienced mediator, will provide extensive injunctive relief and substantial monetary relief. The injunctive relief, which exceeds the injunctive relief provided by the Settlement Agreement in the *Augst-Johnson* gender discrimination action, will materially advance the goal of equal opportunity for African-Americans and Latinos at Morgan Stanley. The $16 million of monetary relief, which compares favorably to other settlements when viewed on an apples-to-apples basis, will make over $14 million available to a relatively small number of class members without the risk and expense of future litigation. The putative class members in this case should be given the opportunity to learn of the terms of the proposed settlement and to comment on those terms.

Race discrimination class actions present an opportunity to make the world in which we live a better place. Unlike most other settlement contexts, where the primary, and in most cases the sole, measure of the success of the settlement is the amount of monetary relief available to redress past harms, the mark of whether the resolution of a race discrimination class action is truly successful is whether the agreed upon injunctive relief addresses the problems confronted by class members so that current and future class members enjoy equal employment opportunity. Judged by that measure, this proposed settlement is a success. Under the proposed Settlement Agreement, Morgan Stanley will modify its account distribution, hiring, recruitment, compensation, and retention policies and practices in ways that will advance opportunities and equity for African-Americans and Latinos. The proposed Settlement Agreement ensures that African-Americans and Latinos will benefit from changes in policies and practices, as well as new programs, that are part of the Settlement Agreement in the *Augst-Johnson* gender discrimination settlement (which largely addressed account distribution and compensation issues). In addition, the proposed settlement provides relief beyond that provided for in the

Augst-Johnson gender discrimination settlement, including relief focused on hiring, recruitment, and retention issues that are of particular concern to African-Americans and Latinos.

In addition to providing extensive injunctive relief, the proposed settlement will provide substantial monetary relief. When viewed on a per-class-member basis, taking into account the weeks worked by class members, the proposed monetary relief provided for in this case is higher than the monetary relief provided in the *Augst-Johnson* settlement that recently received final settlement approval from the District Court of the District of Columbia. Many members of the proposed class have contacted the firms serving as class counsel and indicated that they would be interested in submitting claim forms in this proceeding.[1] Individuals who do not believe the monetary relief is adequate, including the persons objecting to preliminary approval, can opt out of the settlement monetary relief class.[2]

Not only are the injunctive relief and monetary relief terms of the proposed settlement well within the range of reasonableness, but Ms. Curtis-Bauer is a typical and adequate representative of the claims of settlement class members. Ms. Curtis-Bauer was employed by Morgan Stanley as a financial advisor during the class period. She was injured by the same policies and practices that injured other class members in a similar manner. Compared to whites, African-Americans and Latinos employed as Financial Advisors or Financial Advisor Registered Trainees during the class period were compensated less, had higher turnover, received fewer resources to do their jobs, and were hired in smaller numbers than one might have expected given the available labor pool. The injunctive relief provided for in the proposed settlement addresses these issues common to African-Americans and Latinos and will benefit both African-Americans

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[1] The Stowell & Friedman firm emphasizes that it represents individuals who worked in a variety of positions, with a variety of seniorities, in a variety of locations. As the letters in support of the settlement, attached to the Declaration of Heather Wong as Exhibits A through J indicate, persons in a variety of positions and seniorities, including Latinos and current employees, express support for the proposed settlement terms.

[2] Plaintiffs note that of the twenty persons identified in the brief submitted by the Stowell & Friedman firm, some are not members of the proposed class. For example, Mary Evans is a Branch Manager, a job position not included within the proposed class. In addition, Justin Harris was an applicant, but applicants are not included within the class definition. Since those persons are not class members, they do not have standing to object to the proposed settlement. The settlement in this case does not release their claims.

and Latinos. The interests of African-Americans and Latinos in this case are not antagonistic, but co-extensive. Accordingly, Ms. Curtis-Bauer is an appropriate class representative for the proposed settlement class.[3]

Since Ms. Curtis-Bauer is a typical and adequate class representative, and it is uncontested that the other prerequisites for class certification are met, class certification is appropriate. And since the proposed settlement falls within the range of reasonableness, the standard for preliminary approval is met. Based on the record before it, this Court should certify the class, approve mailing of notice to the class informing class members of the settlement terms, and set a final approval hearing where the response of class members can be considered.[4]

STATEMENT OF FACTS

I. The Experienced Mediator Who Presided Over The Mediation Discussions Confirms That The Proposed Settlement Was Negotiated At Arms Length.

Hunter Hughes, the experienced mediator who presided over the negotiations in this case, in addition to the negotiations in the *Augst-Johnson* case, confirms that the proposed settlement in this case is non collusive and was negotiated at arms' length:

> The mediation of this litigation was difficult and time consuming. It first involved informal discovery, data collection, and expert analyses. In conjunction therewith and thereafter, there were multiple in-person sessions in San Francisco, New York, and Charleston, South Carolina; scores of telephonic conferences and settlement calls; and finally negotiations over numerous proposals and counter-proposals between the parties. I actively oversaw the negotiations between the parties over a period of approximately five months.

[3] The Stowell & Friedman law firm attempts to make much of the fact that Ms. Curtis-Bauer will be applying to the Court for a relatively modest service payment and is settling her non-class claims. Neither of those things is unusual, and neither renders her inadequate or atypical as a class representative. *See infra* at Part II.B, pp.14-15. Both will be fully disclosed in the notice to class members.

[4] The Brief of the Stowell & Friedman firm contains a number of inaccurate and misleading statements. Because most of them are irrelevant to the issues before this Court, Counsel for Plaintiff Curtis-Bauer will not attempt to rebut each of them in this response, but instead only address those that are most egregious and relevant. For example, the suggestion that counsel for Plaintiff Curtis-Bauer were soliciting plaintiffs is baseless; as the Declaration of Health Wong makes clear, counsel for Plaintiff Curtis-Bauer investigated the facts of their case by interviewing class members, and kept class members informed of case developments by responding to class member inquires – exactly the tasks counsel should perform. Wong Decl. at ¶¶3-13.

> Throughout the process, counsel for the parties advocated their clients' positions vigorously and at arms' length. In fact, negotiations almost reached impasse on more than one occasion when one side or the other chose not to negotiate off what I considered principled positions. The proposed settlement that voluntarily was reached was the result of well-informed, non-collusive negotiations. There was no discussion of attorneys' fees until after the parties had reached resolution on the class claims. Notably, attorneys' fees and costs were in my experience very reasonable for a case of this magnitude. More importantly, though, they were not a factor in the substantive negotiations of class issues.
>
> As a result of Class Counsel's strongly advanced and argued positions, the injunctive relief in this settlement includes provisions that are tailored to the specific facts and issues in this case and go beyond the injunctive relief in the *Augst-Johnson* case in significant ways that can materially benefit African-Americans and Latinos.
>
> Based on my own observation of (and participation in) the mediation sessions and the information exchanged, I strongly recommended to the parties that the parties accept the terms of the settlement which are reflected in the proposed Settlement Agreement. While it is, of course, ultimately the Court's responsibility to exercise its independent judgment to determine whether this proposed settlement in this case is fair, adequate and reasonable, based on having mediated and litigated more than 40 large class discrimination settlements, I believe the proposed decree is an excellent settlement, and I support its approval.

Report of Mediator Hunter R. Hughes III at ¶¶3 to 6.

II. The Interests Of African-American and Latino Financial Advisors And Financial Advisor Registered Trainees Are Co-Extensive, And Not Antagonistic, With Respect To The Claims In This Case, And The Injunctive Relief Provided By The Proposed Settlement Materially Benefits Both Groups.

On average, African-American and Latino Financial Advisors at Morgan Stanley are compensated less than white Financial Advisors. (Reply Decl. of Adam Klein at ¶4.) Plaintiffs in this case have asserted that this was 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. (Second Amended Complaint at ¶¶2-8, 27-32.) As part of the injunctive relief in this case, Morgan Stanley will de-emphasize the importance of those historical factors, allowing brokers who may not have benefited under the prior compensation scheme to compete more favorably going forward. (Settlement Agreement, Section VII.C.) That change will benefit both African-Americans and Latinos.

African-American and Latino Financial Advisor Registered Trainees and Financial Advisors are also similarly situated in that both groups are hired into Financial Advisor and Financial Advisor Registered Trainee positions at lower rates than some might expect.[5] (Reply Decl. of Adam Klein at ¶5.) The proposed Settlement Agreement requires Morgan Stanley to take specific steps to increase the representation of qualified African-Americans and Latinos in Financial Advisor and Financial Advisor Registered Trainee positions.[6] (Settlement Agreement Sections VII.A., VII.B, VII.G.)

African-Americans and Latinos are also similarly situated with respect to turnover from the Financial Advisor Registered Trainee and Financial Advisor positions. Both groups have substantially higher rates of turnover than whites. (Reply Decl. of Adam Klein at ¶6.) The proposed Settlement Agreement contains provisions designed to increase retention and decrease the turnover rates of African-American and Latino Financial Advisor Registered Trainees and Financial Advisors. (Settlement Agreement Section VII.C, VII.G.) These provisions will benefit both African-American and Latino class members.[7]

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[5] Not surprisingly, counsel for plaintiff Curtis-Bauer and counsel for Morgan Stanley disagree about the appropriate qualified labor pool.

[6] Notwithstanding this substantial injunctive relief, there is no release of applicant claims under the Settlement Agreement.

[7] The Stowell & Friedman firm assumes that African-Americans and Latinos have different interests, but has presented no evidence that the interests of these groups are antagonistic, as opposed to co-extensive. Counsel for plaintiff Curtis-Bauer do not know what the Stowell & Friedman firm is referring to on p.18 of its brief where it states, without citation, that "during a phone conversation with counsel for the Moore group, counsel for the *Jaffe* plaintiffs conceded that the workforce data revealed significant differences in outcomes for African-Americans and Latinos, including their representation, retention, and compensation." The numbers for the two groups are not identical, but that is not the standard. *See Dukes v. WalMart Stores*, 474 F.3d 1214, 1232 (9th Cir. 2007) (even if different class members "may have received different levels of pay and were denied promotion at different rates," typicality is satisfied if "the discrimination they allegedly suffered occurred through an alleged common practice").

ARGUMENT

I. THE PROPOSED SETTLEMENT FALLS WITHIN THE RANGE OF REASONABLENESS.

A. The Proposed Settlement Provides Extensive Injunctive Relief.

The proposed settlement provides extensive injunctive relief. The proposed Settlement Agreement ensures that the policy changes and new programs of the *Augst-Johnson* settlement will benefit African-Americans and Latinos, and provides substantial injunctive relief beyond that provided in the *Augst-Johnson* settlement.

With respect to account distribution and compensation issues, this Settlement Agreement, unlike the one in *Augst-Johnson*, ensures that "the Industrial Psychologists will also review annually the actual account distributions and related compensation data and the rankings of African American and Latino Financial Advisors on each of the individual factors and use such information considering recommendations, if any, for changes to the Power Ranking Formula." (Section VII.D.2.d.) Under this Settlement Agreement, not only will the system used for account distribution de-emphasize historical measures such as assets under management and past production[8] – which have disadvantaged African-Americans, Latinos, and women in a similar way – but, in addition, the system will be continuously monitored, and, if appropriate, further improved. *Id.*

This Settlement Agreement also contains provisions, not included in the *Augst-Johnson* Settlement Agreement, designed to address hiring, recruitment, and retention issues of particular concern to African-Americans and Latinos. For example, Section VII.B specifies a number of specific steps Morgan Stanley must take to increase the recruitment of qualified diverse candidates, including qualified Latinos and African-Americans. Sections VII.C and VII.G require reporting on the success of recruiting efforts. Section VII.C requires that a meaningful component of Branch Manager compensation be tied to diversity success.

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[8] Significantly, the participation of counsel for plaintiff Curtis-Bauer in the negotiations over the formula to be used for account distribution led to even greater de-emphasis on historical factors than had originally been contemplated by counsel for the plaintiffs in *Augst-Johnson* and counsel for Morgan Stanley. (Reply Decl. of Adam Klein at ¶9.)

In order to make Morgan Stanley's recruitment and retention efforts more successful, Section VII.G.2 provides that Morgan Stanley shall retain Industrial Organizational Psychologists to conduct a job analysis for the Financial Advisor position, and to make recommendations about ways of improving representation rates and decreasing departure rates of African-Americans and Latinos in the Financial Advisor position. Section VII.E requires Morgan Stanley to conduct exit interviews of Financial Advisors and Financial Advisor Registered Trainees who terminate voluntarily in order to get a better understanding as to the reason for the departure.

With respect to retention, Section VII.C of the Decree requires that Morgan Stanley assist Financial Advisor Trainees to obtain the Series 7 registration. In Section VII.G.2, the Industrial Psychologists are tasked with making recommendations on how to increase Series 7 passage rates of African-American and Latino Advisor Trainees.

Section VII.C also requires diversity training that incorporates elements of the Implicit Association Test – a measure of implicit bias – or a similar tool agreed upon by the parties. Counsel for plaintiff Curtis-Bauer believe this provision, which recognizes the importance of implicit bias, is ground-breaking. Recognizing that much diversity training is unsuccessful since the persons being trained often say "this does not apply to me," these provisions use the latest research to make the diversity training provided truly meaningful.

All of these provisions were negotiated as part of this lawsuit. None are part of the *Augst-Johnson* Decree. Accordingly, the suggestion that Morgan Stanley would be legally obligated to implement this injunctive relief without the approval of this Settlement is not accurate.[9]

The injunctive relief provided by this proposed Settlement Agreement is real and meaningful. It will enhance equal opportunity for Latino and African-American Financial Advisors and Financial Advisor Registered Trainees at Morgan Stanley. The injunctive relief alone makes this settlement worthy of preliminary approval.

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[9] The fact the Stowell & Friedman law firm sent a letter to this Court on October 23, 2007, criticizing the settlement as inadequate before it "fully" read the terms of the injunctive relief is telling. (October 23, 2007 Letter at 1 n.1.)

B. The Proposed Settlement Will Provide Substantial Monetary Relief.

The proposed settlement provides monetary relief in the amount of $16 million, plus interest at a rate of 5% from the date of preliminary approval until ten days after the Effective Date (*i.e.*, after final approval and the resolution of any appeals), and then will earn additional interest as part of the Qualified Settlement Fund until all settlement amounts have been paid. If the settlement funds are distributed approximately six months after preliminary approval, the settlement fund will increase by approximately $400,000. The interest earned on the settlement fund is expected to be sufficient to cover the cost of claims administration, opt out credits, any service payment awarded to Ms. Curtis-Bauer, and the settlement of Ms. Curtis-Bauer's non-class claims. Accordingly, assuming the Court awards the attorneys' fees and service payments requested,[10] after deduction of attorneys' fees for work prior to approval ($800,000), attorneys' fees for five years of monitoring ($750,000), the cost of notice and claims administration (less than $50,000),[11] service payment ($25,000), and the settlement of Ms. Curtis-Bauer's non-class claims ($125,000), over $14.65 million will be left for distribution to members of the settlement class who submit a timely and valid claim form. This money will be available to all settlement class members who submit a timely and valid claim form, without the need for any additional litigation or arbitration proceedings.[12]

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[10] The Notice correctly states that class counsel will move for an award of $1.55 million in fees (less than 10% of the common fund), and that Ms. Curtis-Bauer will apply for a service award of $25,000. To the extent the Court reduces the attorneys' fees or service payments requested, the settlement fund will be even higher.

[11] *See* Reply Finberg Declaration, ¶5.

[12] In the *Martens* case cited by the Stowell & Friedman law firm, in contrast, there was no settlement fund at all. Class members could only participate and obtain money by going through (and winning) an adversary arbitration proceeding. The overwhelming majority of potential class members chose not to do so, and over 92% of class members released their claims but received nothing at all. Only approximately 8% of the class members who were willing to go through that adversarial arbitration proceeding collected any money. *Martens v. Smith Barney, Inc.*, 2003 U.S. Dist. LEXIS 11587 (S.D.N.Y. 2003) ("[t]his [Martens v. Smith Barney] was a case with approximately 23,000 class members . . . . Roughly 1,900 initial submissions were filed with Smith Barney . . . .") (internal quotations omitted). Taking into account the total class of approximately 23,000 persons who released claims, the total recovery per person in *Martens* was only an average payment of $4,347 per class member, which is slightly over one third of the average monetary recovery in this case, assuming 100% participation by class members who released claims.

Before negotiating class monetary relief, counsel for plaintiff Curtis-Bauer obtained comprehensive personnel and compensation data from defendant, retained an expert statistician to help them analyze that data, and reviewed both liability and damages analyses. The $16 million settlement fund was arrived at after a good faith negotiation that took into account the maximum amount that plaintiffs could recover if a class was certified and plaintiffs prevailed on liability, but reflected the risk that plaintiffs would lose at one or more stages of the proceeding or receive less in damages than they requested at trial.

The law firm challenging this settlement asserts that the $16 million negotiated by informed counsel is inadequate, but concedes that they have not obtained or reviewed any data. Accordingly, they have no factual basis for rendering an opinion on either the class's likelihood of succeeding on its compensation claims, or on the amount the class would likely recover if it succeeded. Their opinion that the $16 million is inadequate is not supported by the facts in this case.

In an attempt to bolster their position that the $16 million in monetary relief proposed in this case is inadequate, objectors point to a number of other settlements that they describe as comparable settlements. Those settlements, however, were reached in cases involving different industries (soda bottling and petroleum exploration, refining, and distribution), different claims (wage/hour), different companies (Merrill Lynch), different facts, and much larger numbers of class members. Some of these cases did not even involve settlement funds at all, but instead required class members to participate in adversarial proceedings in order to recover. Comparisons to cases involving such widely different claims and facts are not meaningful or useful.[13]

The closest comparable to which objectors point is the *Augst-Johnson* gender discrimination case against Morgan Stanley involving compensation discrimination claims arising out of Morgan Stanley's account distribution and compensation policies – claims and policies at

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[13] The District Court in the *Augst-Johnson* case rejected an almost identical objection by the Stowell & Friedman firm to the *Augst-Johnson* settlement, when it approved that settlement on October 27, 2007. (Reply Decl. of James M. Finberg, Exh. C.)

issue in this case with respect to the same company. An analysis of the monetary relief in that settlement compared to the monetary relief in the proposed settlement before this Court, however, establishes that the proposed monetary relief in this case is even stronger than the monetary relief that was approved in *Augst-Johnson*. That is true for several reasons, even though the total nominal amount of the *Augst-Johnson* settlement is higher then the total nominal amount here. First, a much higher amount of attorneys' fees was claimed in the *Augst-Johnson* settlement -- $13,500,000 in fees in *Augst-Johnson*, compared to only $1,550,000 in this case, covering both work through final approval and five years of monitoring. (*Augst-Johnson* Final Order, Reply Finberg Decl. Exh. C; *Jaffe* Proposed Notice of Settlement, Docket Entry 87(2), Exh. C.) Second, the *Augst-Johnson* class contained many more class members – 2,867 class members, compared to only approximately 1,300 in this case. (*Augst-Johnson* Final Order, Reply Finberg Decl. Exh. C; Reply Klein Decl. ¶7.) Third, because African-Americans and Latinos have particularly high turnover compared to whites, members of this class had fewer average weeks worked than the members of the *Augst-Johnson* class.[14] (Reply Klein Decl. ¶8.) In order to make an apples-to-apples comparison between the monetary relief in the two settlements, one must take these factors into account. If one does, the comparison is favorable to the proposed settlement before this Court. The per-person average award in the proposed settlement and the *Augst-Johnson* settlement, net after attorneys' fees and assuming equal participation rates, are nearly identical. When number of weeks worked is taken into account, the per-person per-week amount paid in this proposed settlement is higher than in the *Augst-Johnson* settlement.[15]

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[14] In addition, the class release in this case is narrower than the claims released by the class in *Augst-Johnson*. (Settlement Agreement Section V.)

[15] Objectors' criticisms of the proposed notice are without merit. The proposed notice does not include a specific statement of the amount that each class member can expect in terms of an award, because award amounts cannot be determined until all claims have been submitted. With respect to items to be deducted from the settlement fund, counsels' expectation is that the costs of claims administration (less than $50,000), combined with the service payment ($25,000) and settlement of non-class claims to plaintiff Curtis-Bauer ($125,000), can be paid out of the interest that will accrue on the settlement fund ($400,000).

The allocation formula set forth in the proposed notice gives class members adequate information and mirrors similar formulas typically approved in class settlements. The allocation

II. MS. CURTIS-BAUER IS A TYPICAL AND ADEQUATE CLASS REPRESENTATIVE.

A. Since the Interests of African-Americans and Latinos are Co-Extensive, Not Antagonistic, Ms. Curtis-Bauer is a Typical and Adequate Representative of both Latinos and African-Americans.

Where, as here, African-Americans and Latinos were subject to the same discriminatory policies and suffered harm in the same way from those policies, a member of one of the two protected groups can represent one class consisting of both protected groups. As *Newberg on Class Actions* states:

> In suits alleging racial or national origin discrimination when claims of sex discrimination are not at issue, courts appear willing to allow one plaintiff to represent another or several minority or affected groups in employment suits, when the several groups are similarly situated with respect to the discrimination issues in the pleadings. For example, classes have been certified in which African-Americans have represented Mexican-Americans, Chicanos, those with Spanish surnames, Native Americans, and Asians.

8 *Newberg on Class Actions* §24.54 (4th ed. 2002).

The *Newberg* treatise is fully consistent with the Ninth Circuit's holdings regarding the adequacy and typicality requirements. *Staton v. Boeing*, 327 F.3d 938, 957 (9th Cir. 2003); *Hanlon v. Chrysler Corp*., 150 F.3d 1011, 1020 (9th Cir. 1998). A class representative is adequate absent any conflicts of interest with the proposed class. *See, e.g., Staton*, 327 F.3d at 957. Under the "permissive standards" for typicality, a class representative's claims are typical

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formula takes into account whether a class member's earnings are within two standard deviations of the mean earnings of Caucasians. The court-approved settlement agreement in *Augst-Johnson* included the same factor. Eighty-five percent of the allocation formula is determined by each individual's tenure at Morgan Stanley and personal circumstances, factors about which class members have knowledge. Contrary to the Stowell & Friedman firm's assertions, the allocation formula set forth in the proposed notice is entirely consistent with the allocation formula in the Settlement Agreement. The description of the allocation formula in the proposed notice is simply *more specific* than the description in the Settlement Agreement, and gives class members even more information to assist their decision-making.

With respect to the release, the notice quotes the express language of the release of claims, so class members can easily assess which claims would be preserved and released.

Of course, the parties are certainly open to suggestions the Court might offer that would reasonably improve the effectiveness of the proposed notice.

"'if they are reasonably coextensive with those of absent class members; they need not be substantially identical.'" *Dukes v. Wal-Mart Stores*, 474 F.3d 1214, 1232 (9th Cir. 2007) (citing *Hanlon*, 150 F.3d at 1020). "'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 conduct.'" *Dukes*, 474 F.3d at 1232 (citing *Hanon v. Dataproducts Corp.*, 976 F.2d 497, 508 (9th Cir. 1992)).

As long as a class representative satisfies these standards, there is no requirement that he or she be of the same race or ethnicity as all of the class members. *See, e.g., N.O.W. v. Bank of California*, 1972 WL 246, *4 (N.D. Cal. 1972) (African-American named plaintiff can represent all African-American and Chicano class members discriminated against on the basis of race); *Leonard v. Southtec, LLC*, 2005 WL 2177013, at *10-11 (M.D. Tenn. 2005) (African-American named plaintiffs can represent Hispanic class members because "there is a common injury of discriminatory treatment and a common interest in ending the alleged discriminatory treatment" and no conflicts of interest); *Gaines v. Boston Herald, Inc.*, 998 F. Supp. 91, 112 (D. Mass. 1998) (African-American named plaintiff can represent Hispanic class members because both groups were affected by same employment practices and any injunctive relieve award would cover class as a whole); *Tennie v. City of N.Y. Dept. of Social Servs.*, 1987 WL 6156, at *3 (S.D.N.Y. 1987) (African-American female named plaintiffs can represent Hispanic female class members because both allege "they have been discriminated against in precisely the same manner"); *Jones v. Milwaukee County*, 68 F.R.D. 638, 640-641 (E.D. Wis. 1975) (African-American named plaintiffs can represent Spanish-surnamed and American Indian class members).

The cases cited by objectors are distinguishable. In *Payne v. Travenol Labs., Inc.*, 673 F.2d 798, 810 (5th Cir. 1982), *cert. denied* 459 U.S. 1038, the Fifth Circuit held that an African-American female could not represent African-American male class members because there was an *actual conflict* between men and women. The female plaintiffs alleged that men were favored at their expense; and the interests of the male class members directly conflicted with the interests of the female plaintiffs. *Payne*, 673 F.2d at 810-11.[16]

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[16] Moreover, the Fifth Circuit emphasized that its holding was not a *per se* rule: "the court must

Here, in contrast, there is no allegation of any conflict between African-Americans and Latinos. No one has suggested that either group benefited at the expense of the other. Indeed, objectors speculate only that African-Americans *might* have suffered more than Latinos from Morgan Stanley's discriminatory practices. But the class representative's claims "'need not be substantially identical'" to the claims of all class members. *Dukes*, 474 F.3d at 1232 (citing *Hanlon*, 150 F.3d at 1020). Indeed, even if there were differences in the degree of negative impact resulting from discriminatory policies and practices, those differences would not defeat adequacy or typicality; class members need only suffer a "similar injury from a general policy of employment discrimination." *Dukes*, 474 F.3d at 1232. The Ninth Circuit has explicitly held that even if different class members "may have received different levels of pay and were denied promotion or promoted at different rates," typicality is satisfied if "the discrimination they allegedly suffered occurred through an alleged common practice." *Dukes*, 474 F.3d at 1232. African-Americans and Latinos here were subject to the same discriminatory policies and suffered harm in the same way from those policies, and the remedies provided in the proposed settlement agreement will benefit all class members in the same way. Therefore, Ms. Curtis-Bauer satisfies the settled standard for typicality in the Ninth Circuit. *Dukes*, 474 F.3d at 1232 (citing *Hanon*, 976 F.2d at 508).

B. The Settlement of Ms. Curtis-Bauer's Non-Class Claims and Payment of a Service Payment do not defeat Adequacy or Typicality.

The settlement of non-class claims by, and payment of a service payment to, a class representative do not create conflicts between the class representative and the class members; nor do they destroy typicality or adequacy. As the *Newberg* treatise states, "[s]ettlement agreements in employment discrimination class actions may contain provisions awarding monetary recoveries

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examine the interlacing allegations of race and sex discrimination to determine whether an actual conflict exists. For example, if a black female plaintiff argues that the employer favors white males to the detriment of both females and blacks, there is no inherent obstacle to her representation of both groups." *Payne*, 673 F.2d at 811. In *Bartelson v. Dean Witter & Co.*, 86 F.R.D. 657, 669 (E.D. Pa. 1980), a white female class representative with sex discrimination claims sought to represent minority class members with race discrimination claims. The court held that the factual circumstances and legal theory underlying the class representative's claim for sex discrimination were not typical of claims of race discrimination. *Bartelson*, 86 F.R.D. at 661.

and other special benefits to named plaintiffs for their unique claims." 8 *Newberg on Class Actions* §24.129 (4th ed. 2002). This District has made clear that non-class claims alleged by a class representative do not render the class representative non-typical. *Satchell v. FedEx Express*, 2006 WL 3507913, at *1 (N.D. Cal. 2006). Similarly, the existence of non-class claims does not render the class representative inadequate unless those claims lead to an unfavorable settlement agreement or refusal to enter a settlement agreement. *Krzensniak v. Cendant Corp.*, 2007 WL 1795703 (N.D. Cal. 2007) (James, M.J.) (citing *In re Activision Sec. Litigation*, 621 F. Supp. 415 (N.D. Cal. 1985)). Here, the proposed settlement agreement is favorable to all class members; the settlement of Ms. Curtis-Bauer's non-class claims does not affect the injunctive relief, and does not 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 the interest earned on the settlement fund.[17] Ms. Curtis-Bauer is signing a much broader release of claims against the defendant than will other class members. While Ms. Curtis-Bauer will release *all* claims of *any* kind against Morgan Stanley,[18] other class members will release only claims based on race and/or color discrimination based on the facts alleged in the Second Amended Complaint. Specifically, class members will not release any termination, advancement into management, constructive discharge or harassment claims arising from circumstances other than low production, failure to satisfy position requirements, failure to satisfy requirements of the training program, production related reductions-in-force, or other production based performance

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[17] Objectors conflate the issue of typicality with the requirements of Rule 23(b), arguing that because Ms. Curtis-Bauer will receive a settlement payment for her non-class claims, her "individual claims appear to predominate over her race discrimination claims, so they cannot be typical of the class." (Brf. at 12 (citing *O'Neal v. Wackenhut Servs. Inc.*, 2006 U.S. Dist. LEXIS 34634, at *57 (E.D. Tenn. 2006).) Here, however, the extensive injunctive relief provided predominates over any individual claims. The case cited by objectors is factually distinguishable in several other respects as well. In *O'Neal*, the court found the class representatives to be inadequate and non-typical representatives of a class of applicants because one had been terminated from two previous jobs, and there was evidence that the other had been unprofessional and rude to defendants' staff during his job interview. In this case, there are no facts indicating that Ms. Curtis-Bauer has weaker claims than the remainder of the class.

[18] Ms. Curtis-Bauer heard racial epithets in her workplace and was terminated; she has a variety of non-class claims including race harassment, constructive discharge, wrongful termination, and interference with prospective business advantage, all of which she releases as part of a broader release than the class.

based performance related terminations. The settlement agreement therefore preserves any additional class member claims, and the fact of Ms. Curtis-Bauer's separate release does not indicate any conflict of interest with those class members.

Further, "named plaintiffs . . . are eligible for reasonable incentive payments." *Staton*, 327 F.3d at 977. The requested service payment of $25,000 to Ms. Curtis-Bauer would compensate her for the time and effort she expended to protect the interests of the class and the risk she has taken that her future career prospects in the financial services industry will be diminished due to her efforts on behalf of the class. *See Staton*, 327 F.3d at 977. If this Court finds that $25,000 exceeds the value of the time and effort Ms. Curtis-Bauer expended, it can reduce, or deny, her application for the service payment, and any excess amount will revert to the class.

The objectors cite *Staton* for the proposition that "[c]lass representatives cannot receive disproportionately special treatment" (brf. at 11), but the facts in *Staton* are distinguishable from the present case. In *Staton*, a group of 264 individuals, less than 2% of the class, negotiated separate payments totaling $3.77 million, *more than half* of the total $7.3 million monetary award. *Staton*, 327 F.3d at 948. Here, even if the settlement of Ms. Curtis-Bauer's non-class claims and the service payment are combined, the $150,000 payment to Ms. Curtis-Bauer is less than 1% of the total settlement amount. Ms. Curtis-Bauer will *not* receive "disproportionately special treatment" – instead, she will receive a modest settlement of her non-class claims and, if approved by this Court, a service payment to compensate her for her services on behalf of the class.

CONCLUSION

For the reasons set forth in plaintiffs' moving papers, and this reply, and based on the record before the Court, this Court should certify the proposed class, approve mailing notice of the proposed settlement, and set a date for a fairness hearing.

Dated: November 19, 2007 /s/ James M. Finberg

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