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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

MARGARET BENAY CURTIS-BAUER on behalf of herself and all others similarly situated,

Plaintiffs

vs.

MORGAN STANLEY & CO. INCORPORATED, f/k/a/ MORGAN STANLEY DW, INC.,

Defendant.

Case No. C 06 3903 (TEH)

DEFENDANT'S REPLY MEMORANDUM IN RESPONSE TO THE OBJECTORS' OBJECTIONS AND IN SUPPORT OF FINAL APPROVAL

Date: **June 16, 2008**
Time: **10:00 AM**
Dept.: **Courtroom 12, 19th Fl**
Before: **Hon. Thelton E. Henderson**

I. INTRODUCTION

Defendant Morgan Stanley & Co. Incorporated ("Defendant" or "Morgan Stanley") hereby replies to the objections filed on April 28, 2008 by the Moore Group of Opt-Outs, additional Opt-Outs [1], and Objectors Debra Frazier, Jonathan Glover, Latrissa Gordon, Peter Meme, Marshell Miller, Jerome Senegal, Marilyn White[2], and Kenneth Winn[3] (the "Objectors"). The Moore Group[4], which filed objections during the preliminary approval stage of these proceedings (See Docket Nos. 95, 119, 123, 145 and 152) reasserts the same objections, along with the additional Opt-Outs, against final approval (See Docket No. 162). The Objectors[5] now also assert the identical objections raised by the Moore Group during the preliminary approval hearing (See Docket No. 161). The Moore Group, the additional Opt-Outs and the Objectors are all represented by Stowell & Friedman ("Objectors' counsel").

Plaintiff responded to these objections in Plaintiff's Separate Memorandum of Points and Authorities in Support of Joint Motion for: (1) Final Approval of Class Action Settlement; (2) Certification of Settlement of Class; and (3) Approval and (4) Distribution of Settlement Funds. No objections or responses to the Motion for Final Approval were filed by the May 27, 2008 deadline. In this Reply Brief, Defendant responds only to the objections that relate specifically to it and to those which Defendant believes it may more effectively address.

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[1] The Moore Group of Opt-Outs and additional opt-Outs includes Ronald Moore, Morris Allen, Jr., Michael Barnett, Anthony Bell, Patrick Carter, Martin Dixon, Ernest Dorsey, Theron Cyrus, Lanta Evans-Mott, Janice Grant, John Greer, Vincent Griffin, Mark Lewers, Maurice Mabon, Carlton McDowell, Sarah Nyamuswa, James Owens, Brian Roy, Hubert Stallings, Marion Tucker, and Denise Williams. John Greer, who was initially identified as a member of the Moore Group, filed a timely rescission of his Opt-Out and, thus, may not be a member of the Moore Group.

[2] Marilyn White does not have standing to object to the settlement, as she is not a member of the class by virtue of executing a General Release of All Claims against Morgan Stanley on April 21, 2006, which followed her termination. *See* Supplemental Declaration of Alexa B. Pappas ¶2, Exhibit A, ¶¶6-8.

[3] Kenneth Winn does not have standing to object to the settlement, as he is not a member of the class by virtue of the fact that his employment with Morgan Stanley was terminated on August 30, 2002. Thus, Mr. Winn's employment with Morgan Stanley is outside of the class period of October 12, 2002 to December 3, 2007. *See* Supplemental Declaration of Alexa B. Pappas ¶3.

[4] The Moore Group includes Ernest Dorsey. However, Mr. Dorsey does not have standing to object the settlement. During Dorsey's employment with Morgan Stanley, he was neither a Financial Advisor nor a Registered Financial Advisor Trainee. Thus, he is not a class member, as defined by the settlement agreement. *See* Supplemental Declaration of Alexa B. Pappas ¶2, Exhibit A, ¶4.

[5] Objector Billy Manning also filed objections, which also reiterates allegations of the Moore Group but who so far appears to be unrepresented by Moore counsel.

Among the arguments Objectors make in support of their claim that the settlement is unfair are: (1) the Court does not retain jurisdiction; (2) there is no reporting of the progress of the settlement to the Court; (3) only Class Counsel can enforce its provisions; (4) there are no goals and timetables, and Morgan Stanley is only required to use its "best efforts" with respect to increasing representation numbers of African-Americans and Latinos in hiring, compensation, retention, partnerships and promotions; (5) it is inappropriate to use Dr. Kathleen Lundquist as one of the Industrial Psychologists; (6) the agreement does not address mandatory arbitration; (7) that the new account distribution policy was not made available to former employees; (8) the Supreme Court's *Ledbetter* decision justifies a higher settlement amount; and (9) Morgan Stanley should be required to reform its teaming policies.

As demonstrated below, these arguments ignore or misread specific provisions in the Settlement Agreement, are inconsistent with agreements Objectors' counsel entered into and rely upon, and are based on erroneous understandings of the facts and law. Therefore, this Court should reject these objections and grant final approval of the settlement.

II. ARGUMENT

THIS COURT SHOULD GRANT FINAL APPROVAL OF THE SETTLEMENT AGREEMENT BECAUSE THE OBJECTIONS RAISED ARE WITHOUT MERIT.

A. Contrary To The Assertion Of The Objectors, This Court Maintains Jurisdiction Over the Enforcement of This Settlement Agreement.

Objectors argue that the settlement is unfair because this Court does not retain jurisdiction over the settlement. (See Docket No. 161 at Pg. 9). This objection is based on a misreading of the settlement agreement. The settlement agreement filed by the parties on February 11, 2008, provides that the Court retains jurisdiction to enforce the terms of the settlement agreement (see Settlement Agreement, Docket No. 159, at Pg. 47).[6]

This objection with which the Court has already dealt should be overruled.

[6] Objectors' counsel raised this concern during the preliminary approval hearing. The parties represented to the Court at that time that it was their understanding that the final judgment did indeed reserve continuing jurisdiction in the Court. The Settlement Agreement was revised to specifically state that the Court would retain jurisdiction to enforce the terms of the settlement throughout the settlement term.

B. Objectors Ignore the Extensive Reporting Requirements of the Settlement Agreement.

Objectors also argue that the settlement is unfair because it does not require Morgan Stanley to report its progress with respect to African-American and Latino representation, compensation and promotion into management directly to the Court. (See Docket No. 161, Pg. 9).

This objection fails to consider the extensive reporting schemes that the settlement agreement requires of Morgan Stanley, including extensive reporting to the Diversity Monitor, Fred W. Alvarez, Esq. (Docket No. 159 at Pg. 29, Sec. VII G.1.). The Diversity Monitor will receive monthly reports from Morgan Stanley regarding complaints of race discrimination and resolution of investigations of such complaints. (*Id*. at. pg. 30, Sec. VII G.1.a). The Diversity Monitor will also receive quarterly reports regarding branches in which Branch Managers have filed reports reflecting that they have deviated from the account distribution process. (*Id*. pg. 30). The Diversity Manager will also monitor account distribution data, exception reports, and complaints about policy compliance. (*Id.*) If the Diversity Monitor identifies issues of potential non-compliance, the Diversity Monitor will inform Morgan Stanley and Class Counsel. Where potential non-compliance has been identified, the Diversity Monitor shall have the right to audit the activities in a branch, by reviewing documents, asking Branch Managers to provide explanations and, if necessary, speaking to Financial Advisors in the branch. (*Id.*)

Diversity Monitor will also review the diversity-related quarterly self assessment process for field sales management and the diversity component of the branch management compensation process (*Id*. at Pg. 30.) and monitor the bi-annual training of management on EEO policy, and policies against discrimination and retaliation, and ensure that all training agreed to has been implemented. (*Id.* at g. 31.). The Diversity Monitor's role will include review of how Human Resources handles investigations and the resolution process for inquiries and complaints as well as annual results of the exit interviews of African Americans and Latino Financial Advisors and Registered Financial Advisor Trainees. (*Id.* at Pg. 32.)

The Diversity Monitor will also be responsible for providing reports to Class Counsel and Morgan Stanley at least semi-annually regarding the items monitored including the analysis of

account distribution system. (*Id.* at pg. 31.) The Diversity Monitor shall report any incidents of potential material non-compliance with the settlement agreement to Class Counsel and Morgan Stanley and may do so on a more frequent basis than semi-annually. (*Id*. at pg. 31.) The Diversity Monitor will also maintain records throughout the terms of this settlement. (*Id.* at pg. 31.)

In addition, the settlement agreement also provides for the joint appointment of Industrial Psychologists Dr. Kathleen Lundquist and Dr. Irwin Goldstein (Docket No. 159, at pg. 31, VII G.2.) Drs. Lundquist and Goldstein shall work with Morgan Stanley to develop innovative, meaningful, novel, state-of-the-art programs. The Industrial Psychologists shall monitor the implementation of the policies and initiatives that Morgan Stanley is obligated to undertake and on an annual basis monitor the representation rates of African-Americans and Latino in the Registered Financial Advisor Trainee and Financial Advisor positions and shall make Morgan Stanley's Diversity Monitor aware of the progress. (*Id.*)

Ironically, a review of the **two** settlement agreements cited most by Objector's counsel, and for which they served as Class Counsel (*Martens v. Smith Barney Inc*., 96 C-3779 (CBM) (S.D.N.Y.) ("*Martens"*) and *Cremin v. Merrill Lynch*, Case No. 96 C-3773 (N.D. Ill.) ("*Cremin*")), do not require reporting of ongoing progress of the settlements to the court. (See Supplemental Declaration of Mark S. Dichter, ("Dichter Supp. Decl.") ¶¶ 2-3, Exhibits A and B). Thus, Objectors counsel's argument that a failure to include provisions requiring ongoing reporting to the Court demonstrates the unfairness of a settlement is extremely disingenuous. Given that neither the *Cremin* nor *Martens* settlements include a Diversity Monitor or Industrial Psychologists with such extensive reporting roles, the instant settlement provides for far more reporting that Objector's counsel has previously required in its settlements.

C. The Limitation of Enforcement To Class Counsel Is Identical to the Provisions in the *Cremin* and *Martens* Settlements

Objectors' counsel, again, is disingenuous in their efforts to advance false issues as a means to defeat approval of the settlement. Both the *Cremin* and *Martens* settlement agreements contain the identical provisions limiting enforcement to Class Counsel that they now raise

objections about.[7] Objectors counsel's argument that inclusion of the same provision in the instant Settlement Agreement is unfair should be rejected.

D. The Requirement To Use "Best Efforts," Is Similar To the Provisions in the *Cremin* Settlement.

The Objectors attack the settlement because it does not include measurable goals and timetables, but only requires Morgan Stanley to use its best efforts to meet the diversity goals of the settlement agreement. (Docket No. 161 at 9-10.) Objectors' counsel cite their July 1998 settlement in *Martens*, which included goals and timetables, as precedent that such provisions are necessary in employment discrimination cases. (*Id.*).

However, Objectors' counsel conveniently ignore their stipulated settlement in *Cremin*, a gender discrimination class action against Merrill Lynch which was settled **after** *Martens* in September of 1998, and which contained no goals and timetable terms. (See Dichter Supp. Decl., Ex. B.) In fact, like the settlement in the instant matter, *Cremin* required Merrill Lynch to comply in "good faith" with diversity programs. (Dichter Supp. Decl., Ex. B, Sec. 8, pg 58).

As Objectors' counsel have sought and obtained court approval of a settlement with provisions that mirror the ones they now complain about in the instant case, this Court should overrule any such objections.

E. Plaintiff's Objection to the Role of Dr. Lundquist And Unwarranted Attack On Her Credentials Is Based on Erroneous Allegations

The Objectors object to the joint appointment of Industrial Psychologist Kathleen Lundquist because of her work in other cases (Docket No. 161 at 9 11.) and because she is also serving as the industrial psychologist for *Augst-Johnson* settlement. Dr. Lundquist is a highly experienced professional, who brings an exceptional level of skill based on her expert experience working with both employers and employees in discrimination matters and the implementation of

[7] In *Martens*, the settlement stipulation provided that "only Class Counsel [Stowell & Friedman], on behalf of the class, and Smith Barney shall have standing authority to bring any action to enforce this settlement stipulation. (Dichter Supp. Decl., ¶2, Exhibit A, ¶16.6.) Likewise, in *Cremin*, the agreement provides "except with respect to [the internal dispute resolution process], Class Counsel and the firm shall have the exclusive right to enforce the provisions of the settlement stipulation, and no other person shall have the right to enforce the provisions of the settlement stipulation. . . ." (Dichter Supp. Decl. ¶3 Exhibit B, ¶ 16.9)

programmatic relief. This issue was also addressed at the preliminary approval stage. The Court found that "the injunctive relief package is not simply a 'carbon copy' of the relief that Morgan Stanley has already agreed to in the *Augst-Johnson* settlement" (Docket No. 130 at 6) and that "the industrial psychologists and diversity monitor provided for in the settlement will be devoting additional time, analysis, and resources to address race issues, and not displacing relief already agreed to in *Augst-Johnson.*" (*Id*.)

In ordering preliminary approval and citing the declaration of Dr. Lundquist, the Court found that "the programmatic changes that Morgan Stanley will make as a result of the settlement and of [Lundquist's] recommendations will improve productivity, retention, and hiring of minority financial advisors." (Docket No. 158 at 15.) Based on this and other facts, the Court found that "the programmatic relief set out in the settlement agreement is substantive, meaningful, and valuable to the class." (*Id*. at 16.)

The unwarranted attacks on the credentials of Dr. Lundquist and the suggestions that she is somehow biased in favor of employers are completely unjustified and based on erroneous claims. For example, in the *McReynolds v. Sodexho* case where Objectors claim that Dr. Lundquist "defended employers' policies," Dr. Lundquist was in fact, the designated industrial psychologist in the settlement, jointly selected by the parties and approved by the court, rather than defending the employers' policies (See Supplemental Declaration of Kathleen K. Lundquist ("Lundquist Supp. Decl." at ¶3)). Dr. Lundquist's role was to develop new Human Resource processes, including job analyses and selection processes, and to help the company become compliant with the uniform guidelines. (Id.). Furthermore, Objectors conveniently ignore the fact that Dr. Lundquist has testified on behalf of plaintiffs in a number of employment discrimination class actions. (Lundquist Supp. Decl. at ¶7). Finally, Objectors "concern" that Dr. Lundquist lacks financial services expertise is completely wrong. Dr. Lundquist has served as a consultant for Citigroup, UBS, Goldman Sachs, Smith Barney and American Express; all of which are financial services companies, (See Lundquist Decl. at ¶8). There simply is no valid basis to challenge Dr. Lundquist.

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F. Morgan Stanley Does Not Make Arbitration Mandatory

Objectors also take issue with the settlement because it does not include an agreement not to force mandatory arbitration of civil rights claims. (Docket No. 161 at 21.) Again, this objection has been previously rejected by the Court at the preliminary approval stage. (Docket No. 95 at 23). Further, the objection is without substance as there is no evidence in the record that Morgan Stanley requires Financial Advisors to arbitrate discrimination claims. There is no reason to reconsider this argument and it should be rejected.

G. The Account Distribution Policy And PowerRankings Are Available To Current Morgan Stanley Employees

The Objectors reassert the argument made by the Moore Group during the preliminary approval proceedings that they should be permitted to have access to the Account Distribution Policy and PowerRanking system (Docket No. 161 at 11-12.). This argument fails for the same reasons that this Court previously rejected them.

As the Court noted in its preliminary approval order, "The Power Ranking formula is already in place as part of the *Augst-Johnson* settlement; disclosure of the formula here will serve no purpose." (Docket No. 158 at 16). Additionally, the Account Distribution Policy and PowerRanking System are now available to all current Morgan Stanley employees through the *Augst-Johnson* settlement. Therefore, this objection should be rejected.

H. The Supreme Court's Decision In *Ledbetter v. Goodyear Tire* Supports A Lower, Not Higher, Settlement Amount

In attacking the settlement, Objectors make reference to a statement by plaintiffs' counsel of a $36 million "compensation shortfall." However, any attempt to equate a compensation shortfall to a measure of potential damages in this case ignores the nature of the compensation system at issue and the claims in this case. Financial Advisors are compensated on a commission basis, based on the revenue that they generate. Thus, any difference or "shortfall" in compensation is directly attributable to the difference in the revenue generated. The relevant question is "what are the monetary effects, if any, of the actions that Morgan Stanley took that were both discriminatory and impacted a Financial Advisors' earnings?" The existence of a

compensation disparity simply reflects that a Financial Advisor generates less revenue, but does not at all establish the ultimate issue of whether there was a discriminatory act for which Morgan Stanley was responsible that caused the disparity.

Objectors' counsel argue that Morgan Stanley will have the benefit of *Ledbetter v. Good Year Tire,* 127 S. Ct. 2162 (2007) to argue that claims of compensation disparities, resulting from actions taken during the settlement period, cannot be brought following the termination of the settlement period. (Docket No.161 at page 15). Objectors misconstrue and misunderstand the holding of *Ledbetter* and the effects it has on compensation claims.

In *Ledbetter,* the Court held that a Plaintiff must complain about discriminatory decisions within their actionable statute of limitations period. 127 S. Ct. at 2169. Furthermore, a Plaintiff cannot recover for a discriminatory decision that falls outside of the statute of limitations period, even if those decisions have a present effect. *Id*. at 2172. Thus, under *Ledbetter,* the Objectors' argument fails to appreciate that claims for past discrimination are no longer actionable, if not previously complained about. Present-day complaints about compensation disparities based on claims of discrimination that occurred earlier in the careers of Financial Advisors are likely no longer actionable or recoverable, even if there were no settlement of the claims.

Thus, *Ledbetter* has significantly changed the value of claims based on prior acts. As for future or present claims, neither Ledbetter nor the settlement agreement limits the ability to raise new claims of discrimination. In fact, the settlement agreement provides for several avenues to raise complaints, require monitoring to ensure compliance with non-discriminatory policies and a structured mechanism to raise and pursue claims. This objection should be rejected.

I. <u>The Settlement Does Appropriately Address Partnerships and Teams</u>

Objectors further raise an objection to the settlement because they argue that it does not reform partnerships or teams. (Docket No. 161 at 13-14.) This concern was also raised multiple times in the Objectors' previously-filed objections and in the preliminary approval hearing. (See Docket No. 95 at 22. During the preliminary approval hearing, Class Counsel also explained that teams are not created by "a company policy per se" and that the Industrial Psychologists will be charged with the duty of reviewing the team structure. (*Id*. at 73-74.).

In an effort to support their otherwise untenable objections Objectors cite to the EEOC probable cause finding in *Dodson v. Morgan Stanley*, 2007 U.S. Dist. Lexis 85535 (W.D. Wash. November 8, 2007), as holding that Morgan Stanley has teaming practices which could be found to be discriminatory. Objectors' counsel outrageously distorts the facts and procedural background of the *Dodson* case. *Dodson* involved a senior male Financial Advisor and a more junior female Financial Advisor and their mutual agreement to enter into a limited partnership to service a portion of the senior broker's business. When the senior broker selected a male broker instead of Dodson as his partner to service a larger portion of the business, Dodson filed a claim for gender discrimination. *See* 2007 U.S. Dist. Lexis 85535 pg. 6.

In finding only probable cause the EEOC did not find that Morgan Stanley had partnership policies but that Morgan Stanley's policy was to allow Financial Advisors to choose partners for themselves, which in that case resulted in "probable cause" to believe that the Charging Party was denied a partnership based on her sex. (Docket # 161, Ex. H).

Moreover, after initially dismissing Dodson's disparate impact claim regarding discriminatory partnership policies, the Court did not find on reconsideration that Morgan Stanley had partnership policies. Instead the Court said "it is not appropriate for the Court to examine into the sufficiency of Plaintiff's disparate impact claim [regarding partnership policies] on this Motion for Reconsideration because it is simply not appropriately before the Court at this time. *Dodson v. Morgan Stanley*, 2007 U.S. Dist. Lexis 85631 at pg 4 (W.D. Wash. November 20, 2007).

As the parties have determined, it is in the interest of the African-American and Latino Financial Advisors for Morgan Stanley to work with the Industrial Psychologists to develop such appropriate policies and increase minority representations in partnerships.

III. CONCLUSION

This Court should overrule each and every objection raised by the Objectors and grant final approval to the settlement. As demonstrated above, the Objectors and their counsel have had meaningful participation in the settlement proceedings and have repeatedly raised objections

which this Court, Class Counsel and Defendant have demonstrated as insufficient to defeat final approval.

Dated: June 3, 2008

By: /s/ *L. Julius M. Turman*

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