United States District Court,
N.D. California.
Margaret Benay CURTIS-BAUER, et al., Plaintiffs,
v.
MORGAN STANLEY & CO., INC., Defendant.
No. C 06-3903 TEH.

July 7, 2008.

Kelly M. Dermody, Leiff Cabraser Heimann & Bernstein LLP, San Francisco, CA, Adam T. Klein, Justin Swartz, Piper Hoffman, Outten & Golden LLP, New York, NY, Elizabeth A. Alexander, Heather H. Wong, Lieff Cabraser Heimann & Bernstein, LLP, Nashville, TN, Eve Hedy Cervantez, James M. Finberg, Altshuler Berzon LLP, San Francisco, CA, for Plaintiffs.

Rebecca Dianne Eisen, Gregg Paris Yates, James Norman Penrod, Kent Michael Roger, L. Julius M. Turman, Morgan Lewis & Bockius, LLP, San Francisco, CA, Kenneth J. Turnbull, Morgan Lewis & Bockius, LLP, New York, NY, Mark S. Dichter Morgan Lewis & Bockius, LLP, Philadelphia, PA, for Defendant.

ORDER OF REFERENCE TO MAGISTRATE JUDGE FOR EVIDENTIARY HEARING AND REPORT AND RECOMMENDATION

THELTON E. HENDERSON, District Judge.

***1** This matter came before the Court on June 16, 2008 on the Parties' Joint Motion for Final Approval of Class Action Settlement, Certification of Settlement Class, and Approval and Distribution of Settlement Funds. The Court has carefully considered the pleadings, evidence, and argument offered by the proponents of the Settlement and objectors to it. In light of new evidence suggesting that the terms of the Settlement may have been reached without the involvement of any class member, the Court concludes it must revisit its provisional certification of the class and make further inquiry into whether absent class members have been adequately represented.

At the time the Parties first sought provisional certification of the class, Ms. CurtisBauer's adequacy as a representative was far from obvious; as the Court noted, she lacked many of the indicators by which courts ordinarily judge a representative's adequacy. *See* December 12, 2007 Order at 2-3. After seeking additional briefing, however, the Court found she was an adequate representative and provisionally certified the class. February 7, 2008 Order at 5-9. The Court looked to the fairness of the settlement as an indicator that Ms. Curtis Bauer was engaged, informed, and able to represent class members vigorously. *Id.* at 7. Ms. Curtis-Bauer had not been confronted with the settlement as a *fait accompli;* she declared that she reviewed the proposed settlement, made suggestions, felt capable of assessing the settlement, and supported it. *Id.* at 5-7. The Court found that the non-class claims she was releasing were distinct from the class claims. *Id.* at 7-8. Although the $125,000 settlement of those claims was problematic, there was no evidence that it had induced her to sacrifice the interests of absent class members, and there were other ways the Court could judge whether the settlement was fair-including the fact that the District of Columbia court had approved a nearly identical settlement in the *Augst-Johnson* case. *Id.* at 8. The Court therefore refused to deny preliminary approval where there was only the appearance of impropriety, and no evidence of actual impropriety. *Id.* at 9.

But Objectors to the settlement have submitted new testimony that calls the adequacy of representation in this case into question again.[FN1] When the Parties moved for preliminary approval, the Court was aware that the predecessor named plaintiff Denise Williams was dissatisfied with the settlement and planned to opt out, but it assumed that she had been involved in advising class counsel and negotiating the settlement. The Court therefore focused on whether Ms. Curtis-Bauer was an adequate substitute representative. [FN2]

FN1. As Plaintiffs' counsel noted in his June 17, 2008 letter to the Court, the Court stated in its Order provisionally certifying the class and preliminarily approving the settlement that it would not re-hear objections it had already considered, or entertain a motion for reconsideration. The Court's intent was to foreclose further repetitive filings by Objectors, not to abdicate its duty to continually scrutinize whether absent class members are adequately represented. *See Richardson v. Byrd,* 709 F.2d 1016, 1019 (5th Cir.1983) (district court is charged with "monitoring its class decisions in light of the evidentiary development of the case"). The Court can reevaluate class certification and adequacy of representation in light of new evidence and subsequent developments at any time. *General Telephone*

Co. of Southwest v. Falcon, 457 U.S. 147, 160, 102 S.Ct. 2364, 72 L.Ed.2d 740 (1982); *Lyons v. Georgia-Pacific Corp. Salaried Employees Retirement Plan,* 221 F.3d 1235, 1253 n. 32 (11th Cir.2000), *citing* Wright & Miller, 7A FEDERAL PRACTICE AND PROCEDURE § 1765, at 293 (2d ed. 1986) ("[A] favorable decision under Rule 23(a)(4) is not immutable"); *Bywaters v. U.S.,* 196 F.R.D. 458, 468 (E.D.Tex.2000).

FN2. The preliminary approval order noted that "[c]ourts have found that even class representatives who join litigation after a settlement has been reached can adequately represent a class," citing *Olden v. LaFarge Corp.,* 472 F.Supp.2d 922, 937-39 (E.D.Mich.2007) and *Heit v. Van Ochten,* 126 F.Supp.2d 487, 494-495 (W.D.Mich.2001); February 7, 2008 Order at 6. Both were cases that involved substitution of a new class representative for an earlier one who had been involved in the litigation and settlement process.

Ms. Williams now objects that she was never involved in advising class counsel on plaintiffs' race discrimination claims. Declaration of Denise Williams, Exh. A to Objector's Objections to Approval of Proposed Class Settlement, filed April 28, 2008. Ms. Williams' Declaration suggests that, although she was the sole African-American named plaintiff in the suit until August, 2007, she had no opportunity to offer her "opinions and experiences" in negotiating settlement of the race claims. *Id.* ¶ 10. She was never "invited to attend any mediation sessions or allowed to participate in the negotiations of the class settlement," *id.* ¶ 5, even though Plaintiffs' counsel were negotiating a settlement of race claims with Morgan Stanley from March, 2007 until they reached settlement in July, 2007.[FN3] At the time the settlement was announced to the Court on August 2, 2007, she was unaware of its terms, and was "furious" when she learned the details of the settlement. *Id.* ¶¶ 6-7. She received the settlement documents only in October, 2007. *Id.* ¶ 9. She says she was pressured to serve as a class representative. *Id.* ¶ 12. She rejected the settlement because she believed "the monetary relief was insufficient and that there was not any chance that the programs would fix the problems facing African-Americans at Morgan Stanley." ¶ 11.

FN3. As Plaintiffs' counsel testified at the Preliminary Fairness Hearing, they reached an agreement in principle on July 23, 2007, which was later reduced to a Memorandum of Understanding. *See* Reporter's Transcript of Preliminary Fairness Hearing, November 3, 2007 ("PFH RT") at 14.

***2** It would be naive to think that clients ordinarily drive the day-to-day conduct of class action litigation, or even settlement.[FN4] Nonetheless, the allegation that Plaintiffs' counsel negotiated the settlement without involvement, advice, or input from any class member, if accurate, raises serious due process and representation concerns.

FN4. "Experience teaches that it is counsel for the class representative and not the named parties, who direct and manage these actions. Every experienced federal judge knows that any statement[ ] to the contrary is [ ] sheer sophistry." *Greenfield v. Villager Industries, Inc.,* 483 F.2d 824, 832 n. 9 (3rd Cir.1973), *quoted in Culver v. City of Milwaukee,* 277 F.3d 908, 913 (7th Cir.2002); *see also In re Chiron Corp. Securities Litigation,* 2007 WL 4249902, 15 (N.D.Cal. Nov.30, 2007), *quoting Mars Steel Corp. v. Continental Illinois National Bank & Trust,* 834 F.2d 677, 681-82 (7th Cir.1987) (Posner) ("[o]rdinarily the named plaintiffs are nominees, indeed pawns, of the lawyer").

Commentators have also "generally agreed" that the class representative is "more a figurehead than an actual decisionmaker." After a survey of all class actions completed in the Northern District of California from 1985 to 1993, one concluded that

[I]n practice, class representatives serve little beyond a nominal function. They are largely ignored by class counsel and the court and are not assured full participation in the class action proceedings.... Whereas in non-class litigation an attorney has a legal duty to abide by the client's decision on substantial issues such as settlement and appeal, he need not do so in class actions. In fact, even the attorney's duty to keep the client reasonably informed has limited application in the class action setting. Class counsel generally do not communicate with class representatives, thereby effectively removing the representatives from the loop.

Howard M. Downs, "Federal Class Actions: Diminished Protection for the Class and the Case for Reform," 73 NEB. L.REV. 646, 651, 659 (1994); (footnotes omitted) citing Jean W. Burns, "Decorative Figureheads: Eliminating Class Representatives in Class Actions," 42 HASTINGS L.J. 165 (1990); *see also* Edward H. Cooper, "The (Cloudy) Future of Class Actions," 40 ARIZ. L.REV. 923, 927 (1998) ("class representatives often are recruited by class counsel, play no client role whatsoever, and-when deposed ...-commonly show no understanding of their litigation."). In an empirical survey of nearly 1,000 federal class certification opinions, one commentator found that "the vast majority of courts conduct virtually no gate-keeping function and approve class representatives and class counsel with little or no analysis." Robert H. Klonoff, "The Judiciary's Flawed Application of Rule 23's 'Adequacy of Representation' Requirement," 2004 MICH ST. L.REV. 671, 673. This Court must hew to the Constitution and laws, however, and not to common practice.

Fed. R. Civ. Pro. 23(a)(4)'s requirement that the representative "fairly and adequately protect the interests of the class" unquestionably has constitutional dimensions. *See Hanlon v. Chrysler Corp.,* 150 F.3d 1011, 1020 (9th Cir.1998). A judgment cannot bind absent class members unless "the procedure adopted[ ] fairly insures the protection of the interests of absent parties who are to be bound by it." *Hansberry v. Lee,* 311 U.S. 32, 42, 61 S.Ct. 115, 85 L.Ed. 22 (1940). The Due Process Clause therefore "requires that the named plaintiff at all times adequately represent the interests of the absent class members." *Phillips Petroleum Co. v. Shutts* 472 U.S. 797, 812, 105 S.Ct. 2965, 86 L.Ed.2d 628 (1985), citing *Hansberry,* 311 U.S. at 42-43; *see also* Conte & Newberg, NEWBERG ON CLASS ACTIONS § 1:13 at 41-43. The entire class action mechanism, which finally and permanently determines the rights of absent class members, turns on adequacy of representation.

To provide those assurances, Rule 23(a)(4) requires that the class representative be genuinely involved in the litigation, not just a figurehead "lending his name to a suit controlled entirely by the class attorney." *Beck v. Status Game Corp.,* 1995 WL 422067, 6 (S.D.N.Y. July 14, 1995), *quoting* Wright & Miller, 7A FEDERAL PRACTICE AND PROCEDURE § 1766 (2d Ed.1986) A mere "stand-in" party, "selected by lawyers to fill a required role," is insufficient. *In re Quarterdeck Office Systems, Inc. Securities Litigation,* 1993 WL 623310, *6 (C.D.Cal.1993). Representatives are required "to participate to some minimal degree in the lawsuit." *In re Gaming Lottery Securities Litigation,* 58 F.Supp.2d 62, 76 (S.D.N.Y.1999). Thus, for example, a class representative who is unfamiliar with basic facts and claims of the case, delegates decisions about the case to another person, and "agreed to lend his name to this suit only upon the condition that it would take a minimal amount of time" is inadequate under Rule 23. *In re Sepracor Inc.,* 233 F.R.D. 52, 55 (D.Mass.2005); *see also Quarterdeck Office Systems, supra* at *6 (plaintiffs inadequate where "they relied on investigations by counsel to support their claims," and one said she would "leave the conduct of the litigation to her attorneys"); *Ballan v. Upjohn Co.,* 159 F.R.D. 473, 486 (W.D.Mich.1994) (named plaintiff is inadequate where record is silent on his participation in any of the "crucial decisions" which could affect class members' rights).

Although the Supreme Court observed in *Shutts, supra,* that due process requires the named plaintiff to adequately represent the class "at all times," 472 U.S. at 812, the Court does not read that statement to mean that representation must be absolutely continuous at all times. The Court therefore inquires whether there are critical aspects of litigation in which a representative must participate, how continuous representation must be, or whether late addition of a representative can "cure" an earlier absence of representation.

***3** Few cases address the consequences of having no plaintiff involvement at critical junctures.[FN5] One appellate court refused to approve of a settlement reached without participation by the class representative. In *Saylor v. Lindsley,* 456 F.2d 896 (2nd Cir.1972), the plaintiff's attorney in a derivative stockholder's action entered into a stipulation of settlement with defendants even though the plaintiff himself had not authorized the settlement and did not learn of its terms until weeks later. *Id.* at 898-900. The named plaintiff later objected to the settlement. The Second Circuit observed that while the assent of the named plaintiff was not always essential to a settlement,

FN5. One district court case refused to find a representative adequate where "both the Complaint and the Amended Complaint were filed well before [the named plaintiff] ever spoke with or retained any of the attorneys who are representing her in this case," and she did not want to pursue many of the claims being made in her name-the Court was "unable to understand

and certainly unwilling to accept so many 'curious facts.' " *Efros v. Nationwide Corp.,* 98 F.R.D. 703, 707 (D.Ohio 1983). On the other hand, in the consolidated Agent Orange litigation, Judge Pratt granted class certification on the strength of class counsel alone, before a class representative had even been chosen. Mullenix, "Taking Adequacy Seriously: The Inadequate Assessment of Adequacy in Litigation and Settlement Classes," 57 *Vand. L.Rev.* 1687, 1722-23 (2004) ("Taking Adequacy Seriously"), *citing In re Agent Orange Product Liability Litigation,* 506 F.Supp. 762, 785, 788 (E.D.N.Y.1980).

we are not willing to go to the other extreme and accept the view that attorney for the plaintiff is the *dominus litis* and the plaintiff only a key to the courthouse door dispensable once entry has been effected. The attorney remains bound to keep his client fully informed of settlement negotiations, to advise the client before signing a stipulation of settlement on his behalf.

Id. at 900. Accordingly, the court held that the record before it was "inadequate to sustain the conclusion that this obligation was met here-whatever the timing of the initial agreement in principle on the settlement." *Id.* After noting the limited discovery that had taken place, and discussing the possibility of a recovery far more substantial than the settlement, the court reversed the lower court's approval of the settlement. *Id.* at 900-905.

The Supreme Court considered a settlement reached without a client in *Ortiz v. Fibreboard Corp.,* 527 U.S. 815, 119 S.Ct. 2295, 144 L.Ed.2d 715 (1999). Discussing why class certification was improper, the Supreme Court explained the connection between equitable distribution in settlement, intra-class structural conflicts, and adequacy of representation. *Id.* at 857. It commented that the adequacy inquiry involves both the adequacy of counsel and the named representatives, but noted disparagingly that

"[i]n this case, of course, the named representatives were not even named until after the agreement in principle was reached, and they then relied on class counsel in subsequent settlement negotiations."

Id. at 857 n. 31 (citations to record omitted). One influential commentator argues that the Court's "distaste" for the fact that class representatives were not even named until the agreement in principle was reached teaches that "class representatives should be named before the deal is done." Mullinex, "Taking Adequacy Seriously," at 1714-15.[FN6]

FN6. Indeed, Mullinex (whom Judge Young calls a "leading commentator" on adequacy issues, *In re Relafen Antitrust Litigation,* 231 F.R.D. 52, 85 (D.Mass.2005)) argues that "the [Supreme] Court recognized that adequate representation must be in place during all phases of class proceedings" with its holdings in *Amchem Products, Inc. v. Windsor,* 521 U.S. 591, 117 S.Ct. 2231, 138 L.Ed.2d 689 (1997) and *Ortiz v. Fibreboard Corp.,* 527 U.S. 815, 119 S.Ct. 2295, 144 L.Ed.2d 715 (1999) that "the fairness of a settlement agreement cannot itself bootstrap a finding of adequacy (or satisfaction of the other class certification requirements." *Id.* at 1715, citing *Amchem,* 521 U.S. at 622; *Ortiz,* 527 U.S. at 858. Those holdings do, at least, call into doubt earlier cases holding that courts can retroactively analyze whether the "defect of inadequacy of representation" has "infected the merits" of findings of fact and conclusions of law by examining whether the new representatives are satisfied with the outcome. *See, e.g., Hill v. Western Electric Company,* 672 F.2d 381, 388-389 (4th Cir.1982).

None of these cases squarely answers whether failure to have client involvement during settlement creates due process or representation problems if a class member later scrutinizes and approves the settlement. The Court therefore turns to the rationales underlying the adequacy requirement for guidance.

Most cases that discuss the need for an involved plaintiff focus on the plaintiff's role as a check on class counsel. Judge Orrick, for example, refused to approve of a representative in a securities case who "failed to exhibit an interest in supervising the attorneys," "expressed an intention not to supervise the amount of time spent by his attorneys in prosecuting the case," and who "appear[ed] to have ceded control to his lawyers." *Welling v. Alexy,* 155 F.R.D. 654, 659 (N.D.Cal.1994); *see also Griffin v. GK Intelligent Systems, Inc.,* 196 F.R.D. 298, 302 (S.D.Tex.2000) (plaintiffs inadequate where "were solicited for this lawsuit and have taken little or no supervisory role over lead counsel. They do not participate in litigation decisions, do not receive regular cost/expense information, and they learn of activity in the case when they are copied on matters already completed"); *Gaming*

Lottery Securities Litigation, 58 F.Supp.2d at 76 (plaintiff participation cannot be "so minimal as to indicate a virtual abdication to the attorneys of the conduct of the case").

***4** Judge Walker explained the reasons for emphasizing the representative's ability to monitor class counsel in *In re California Micro Devices Securities Litigation,* 168 F.R.D. 257 (N.D.Cal.1996).

> Permitting class counsel who are not effectively monitored to prosecute a class action is the functional equivalent of allowing that counsel to serve as both class representative and class attorney. Such a situation directly implicates the danger of collusion between plaintiff and defense counsel recognized in FRCP 23, which assigns to the courts both broad responsibility and broad power to monitor the conduct of class actions to ensure their essential fairness.

Id. at 260.[FN7] Thus, "[d]uring settlement negotiations the putative class representatives' primary duty" is to ensure that class counsel do not "sacrifice the interests of the class in order to maximize [counsel's] own recovery." *Id.* at 262. In *California Micro Devices,* Judge Walker found that class counsel had effectively made itself the class representative by operating without client monitoring, and concluded that "when putative class counsel are not monitored by an independent and informed client and when that counsel has taken significant action in the case without court oversight or approval, the only adequate class representative ... is a class member who is well-informed about the action and independent of its counsel." *Id.* at 275; *see also Susman,* 561 F.2d at 90 (collecting cases which discuss the danger of conflict); *Apple Computer, Inc. v. Superior Court,* 126 Cal.App.4th 1253, 1264, 24 Cal.Rptr.3d 818 (2005) *and cases cited therein.*

> FN7. For this reason, "[the] majority of courts ... have refused to permit class attorneys, their relatives, or business associates from acting as the class representative." *Susman v. Lincoln American Corp.* 561 F.2d 86, 90 and n. 5, 6 & 7 (7th Cir.1977).

One of the core motives for requiring an active representative, then, is to protect absent class members from counsel tempted to maximize their fees at the expense of the class. But *this* class, in *this* case, is in no need of such protection. As the Court has observed, Plaintiffs' counsel seek a relatively modest fee-approximately ten percent of the monetary fund. *Cf. Vizcaino v. Microsoft Corp.,* 290 F.3d at 1043, 1047-1048 (9th Cir.2002) (25% attorney's fee is benchmark in Ninth Circuit). Plaintiffs' counsel's lodestar now exceeds the amount of fees agreed upon in the settlement (excluding the amounts allotted for future fees and expenses). Application for Attorney's Fees and Expenses, filed May 12, 2008, at 7-8, and Declarations in support thereof. The Court has no doubt that Plaintiffs' counsel are representing their clients in good faith, and do not seek to maximize their profits at their clients' expense. Counsel are, if anything, sacrificing their *own* interests.[FN8]

> FN8. Of course, a different set of incentives may develop over time as class counsel's costs exceed the settlement fees. *See* The Settlement Black Box, 75 *Boston Univ. L. Rev* 1257, 1264-5 (1995), citing *Saylor v. Lindsley,* 456 F.2d 896, 900-901 (2d Cir.1972) (discussing conflicts of interest in any contingent fee litigation, where lawyer stands to lose significant investment of time and costs).

There is another rationale for requiring an engaged representative, however, that has more application here. A representative provides not only supervision but knowledge and advice. For example, an Oregon district court explained that the class is entitled to a representative who will both check the unfettered discretion of counsel *and* "provide his personal knowledge of the facts underlying the complaint....." *Rolex Employees Retirement Trust v. Mentor Graphics Corp.* 136 F.R.D. 658, 665-666 (D.Or.,1991), *citing Greenspan v. Brassler,* 78 F.R.D. 130, 133-34 (S.D.N.Y.1978) and *Saylor v. Lindsley,* 456 F.2d 896, 900 (2d Cir.1972). The Court in *Goldchip Funding, supra,* similarly linked both the ability to supervise and a plaintiff's personal knowledge to due process requirements:

***5** Because absent members of the class would be conclusively bound by the results obtained by these representatives and their attorneys, due process requires that they be more than *pro forma* representatives. *Cf. Hansberry v. Lee,* 311 U.S. 32, 61 S.Ct. 115, 85 L.Ed. 22 (1940). The class is entitled to more than blind reliance upon even competent counsel by uninterested and inexperienced representatives. A proper representative can offer more to the prosecution of a class action than mere fulfillment of the procedural requirements of Rule 23. He can, for example, offer *his personal knowledge of the factual circumstances, and*

aid in renderingecisions on practical and non-legal problems which arise during the course of itigation. An attorney who prosecutes a class action with unfettered discretion becomes, in fact, the representative of the class. This is an unacceptable situation because of the possible conflicts of interest involved.

Goldchip Funding, 61 F.R.D. at 594-595 (emphasis added); *Twyman v. Rockvill Housing Authority,* 99 F.R.D. 314, 322-23 (D.C.Md.1983) (same). [FN9] In *Burkhalter Travel Agency v. MacFarms Intern., Inc.,* 141 F.R.D. 144, 154 (N.D.Cal.1991), the court observed that the representative is required to be familiar with the basic elements of the claim to show there is "an actual party behind counsel's prosecution of the action." *Id.* at 153. The *Bukhalter* court found that the proposed representative had an "alarming unfamiliarity" with the facts and claims in the case, and because "plaintiff's counsel would be acting on behalf of an essentially unknowledgeable client," certifying a class with that client as a representative "would risk a denial of due process to the absent class members." *Id.* at 154. *See also Greenspan v. Brassler,* 78 F.R.D. 130, 134 (S.D.N.Y.1978) ("Plaintiffs' limited personal knowledge of the facts underlying this suit, as well as their apparently superfluous role in this litigation to date, indicate their inadequacy as class representatives").

FN9. *Cf.* Coffee, "Class Action Accountability: Reconciling Exit, Voice, and Loyalty in Representative Litigation," 100 COLUM. L.REV. 370, 373 (2000) (arguing the Supreme Court's *Amchem* and *Ortiz* decisions focused on particular potential abuses, and stopped short of announcing constitutional norms for adequacy of representation; "[a]t most, the Court has warned that it holds in reserve an embryonic theory of 'adequacy of representation,' which it may develop as a due process limitation upon the ability of class counsel to resolve the legal rights of absent or non-consenting class members").

In certain cases, a class representative's personal knowledge may be unimportant-as Objectors' counsel put it, a class representative is unlikely to have special insights crucial to settling a consumer class action involving broken toasters. And here, there are undoubtedly some components of the litigation-such as the effects of the Power Ranking formula on account distribution-that Plaintiffs' counsel can understand as well or even better than the individual plaintiffs.

But other cases-like this employment discrimination action-would seem to require counsel to rely on some class member's firsthand knowledge. It is difficult for the Court to imagine, for example, how counsel could understand all the dynamics that affect African-American and Latino financial advisors at Morgan Stanley, and craft an appropriate settlement of Plaintiffs' discrimination suit, without drawing on the personal experience and advice of some class member.[FN10] And courts considering employment discrimination cases have, indeed, required a representative with certain knowledge and involvement. One held that a "named party's familiarity with the conditions he seeks to challenge on behalf of the class" was a factor in adequacy, and found that the named party was not adequate because he had not worked at the company for eight years and knew nothing of its current policies and practices. *Linder v. Litton Systems, Inc., Amecom Division,* 81 F.R.D. 14, 19-20 (D.C.Md.1978).[FN11] Another held that in employment cases, there was no reason *not* to insist on client involvement:

FN10. Objectors note several examples of how such personal knowledge could affect this case. They argue, for instance, that the Settlement Agreement, as drafted, serves to single minority financial advisors out as troublemakers by requiring them to affirmatively ask managers for information about account distribution and rankings under the Power Ranking system, rather than making such information readily available. *See* Objections, filed April 28, 2008 Exh. J, Declaration of Michael Barnett ("Barnett Decl.") ¶¶ 6-7. They also argue that an informed representative could have relied on his or her personal knowledge to insist that the formation of teams and partnerships is a business practice of Morgan Stanley that should be altered as a component of the settlement. Compare Objections, filed April 28, 2008 at 13-16, and Barnett Decl. ¶¶ 18-28 (arguing that Morgan Stanley's policy of allowing financial advisors to choose partners is an employment practice) with PFH RT at 69, 73, 81 (Plaintiffs' counsel accepted Morgan Stanley's explanation that individual brokers form teams on their own, and concluded they could not get injunctive relief relating to teams in though this litigation).

FN11. Other courts are more willing to rely on lawyers to provide the facts as well as the law: "In a massive class action such as the one at hand, it is counsel for the class who has the

laboring oar. The class representatives furnish the factual basis to invoke the jurisdiction of the court and provide the outline of the controversy, but the lawyers shape the claims for adjudication by the compilation of factual and expert testimony and the presentation of statistical and documentary evidence." *Goodman v. Lukens Steel Co.,* 777 F.2d 113, 124 (3rd Cir.1985)

***6** [A] named plaintiff must display some minimal level of interest in the action, familiarity with the practices challenged, and ability to assist in decisionmaking as to the conduct of the litigation. *In re Goldchip Funding Company,* 61 F.R.D. 592, 594-595 (M.D.Pa.1974); *see Marshall v. Target Stores, Inc.,* 11 F.E.P.Cases 775 (E.D.Mo.1975); *Hyatt v. United Aircraft Corp.,* 50 F.R.D. 242, 245 (D.Conn.1970). Employment discrimination cases do not rest on such sophisticated legal or economic theories as to preclude understanding by named plaintiffs.... Nor are they cases in which injury to any possible representative is so small that the role of the named plaintiff is merely formal.... There would appear to be no other reason to accede to the notion that a class action "belongs to no one so much as to the plaintiff's lawyer," *Satterwhite v. City of Greenville, Tex.,* 557 F.2d [414, 426 (5th Cir.1977)] (Gee, J., dissenting), and the potential for conflict of interest which that position entails. In these cases, a Court can and should insist on a named plaintiff who takes some active interest and has some ability to contribute to the action.
Wofford v. Safeway Stores, Inc., 78 F.R.D. 460, 487 (N.D.Cal.1978). [FN12]

FN12. The *Woford* court rejected the defendants' argument that the named representative could not be adequate because he lived far away. "It is entirely possible that an enthusiastic plaintiff residing at some distance from other class members and from the forum could, by letter, telephone, or personal visit participate in the conduct of the litigation to an equal or greater extent than a local plaintiff." *Id.*

This Court therefore concludes that there are some cases in which having a class representative's "personal knowledge of the factual circumstances, and aid in rendering decisions," *Goldchip Funding,* 61 F.R.D. at 594-95, at crucial stages of the litigation is necessary to ensure due process and adequate representation of absent class members. The Court further holds that whether a class representative's participation (or lack thereof) satisfies these due process and representation requirements is a mixed question of law and fact that depends on a number of factors, including but not limited to:

• how crucial the stage of litigation is to the outcome of the case;

• whether the case is seeking to remedy objectively measurable harm or harm that can easily be monetized, as opposed to harm or conditions involving more subjective or complex issues where critical facts lie exclusively or primarily within the knowledge of class members alone;

• the likelihood that the decisions or outcomes at the stage of litigation in question would have been different had class members been more involved by, for example, providing personal knowledge of critical facts;

• whether any class member was involved at the stage of litigation at issue, and, if so, to what extent; and

• whether any decisions or outcomes from a stage of litigation in which an adequate representative did not participate were approved or ratified by a subsequently added representative and, if so, whether that approval was meaningful-in other words, whether it involved genuine scrutiny and a willingness and/or ability to revisit the earlier decision or outcome, or cursory and perfunctory review.

The Court does not have before it sufficient facts to weigh these factors. This matter is therefore referred to Magistrate Judge Joseph Spero for an evidentiary hearing,[FN13] and for a Report and Recommendation as to 1) whether, under the standard set out above and other applicable standard under Fed. R. Civ. Pro. 23(a)(4), there was sufficient involvement by an adequate representative to meet the requirements of the Due Process Clause and Rule 23; and 2) if not, what a pragmatically appropriate remedy would be in this case.

FN13. *See Johnson v. Georgia Highway Exp., Inc.* 417 F.2d 1122, 1125 (5th Cir.1969) (court may hold evidentiary hearing to explore representation issues), cited in Wright, Miller, and Kane 7A FEDERAL PRACTICE AND PROCEDURE § 1765 at 328 (3d Ed.2005).

***7** The Court expects that the evidentiary hearing in this case will likely touch upon, at a minimum, the involvement of class members, including Ms. Williams, in advising counsel about the conditions and practices challenged in the suit; on the degree to which any class member, including Ms. Williams, was involved in settlement negotiations, developing settlement terms, or discussing settlement options; on Ms. Curtis-Bauer's involvement in the suit and the settlement, her knowledge of the conditions and practices challenged in the suit; and on her understanding of the terms of the Settlement Agreement and its consequences.

Magistrate Judge Spero may undertake any proceedings he deems are appropriate in furtherance of this Referral. The Court also recognizes that the hearing may raise difficult questions of attorney-client privilege, and may require testimony *in camera.* The Court leaves the role of the Objectors and/or Ms. Williams in the evidentiary hearing or any further briefing to the sound discretion of the Magistrate Judge.

CONCLUSION

During the early years of Title VII class action litigation, one judge observed that the "broad brush approach" to adequacy of representation in some Title VII cases stands

> in sharp contrast to the diligence with which in other areas we carefully protect those whose rights may be affected by litigation. If this were [an] individual cross-action against an employee at one of appellee's remote terminals we would turn intellectual handsprings over questions of notice and process to him and opportunity to protect his interestssuch issues as whether the marshal dropped the notice at the door or handed it to the child at the front gate. But when the problem is multiplied many-fold, counsel, and at times the courts, are moving blithely ahead tacitly assuming all will be well for surely the plaintiff will win and manna will fall on all members of the class. It is not quite that easy.

Johnson v. Georgia Highway Exp., Inc., 417 F.2d 1122, 1127 (5th Cir.1969) (Godbold, J., concurring).

The Court does not revisit the adequacy of representation in this case with great enthusiasm. But it is bound to protect the interests of absent class members, *see Davis v. City and County of San Francisco,* 890 F.2d 1438, 1444 n. 5 (9th Cir.1989), and must apply heightened scrutiny and attention to class certification requirements, where, as here, the parties reach settlement without adversarial class certification proceedings. *Staton v. Boeing Co.,* 327 F.3d 938, 952 (9th Cir.2003); *Hanlon v. Chrysler Corp.,* 150 F.3d 1011, 1026 (9th Cir.1998). Ultimately, the Court's entire review of the settlement for fairness under Rule 23(e) is based on the premise that the settlement was negotiated with an adequate representative. The Court examines the fairness of the settlement as a whole, rather than parsing the adequacy of its component parts to see if the terms "could be better," *Hanlon,* 150 F.3d at 1027, precisely because it assumes a vigorous and informed representative arrived at those terms. If the settlement was, in fact, reached without involvement of an adequate representative, those assumptions unravel. The Court would be left with the impossible task of evaluating the fairness of the settlement without the benefit of either adversarial proceedings and factual development, or the structural assurances of adequacy that meaningful representation provides. In the Supreme Court's words, "standards set for the protection of absent class members" in the Rule 23(a) and (b) class-qualifying criteria "serve to inhibit appraisals of the chancellor's foot kind-class certifications dependent upon the court's gestalt judgment or overarching impression of the settlement's fairness." *Amchem,* 521 U.S. at 621. The Court must investigate the adequacy of representation not only to make certain due process guarantees are met, but to ensure its review of the fairness of the settlement is meaningful.

***8 IT IS SO ORDERED.**